

UNIVERSIDAD AUTÓNOMA DE MADRID

TESIS DOCTORAL

**The Dogmatic of Article 101
TFEU and Information
Exchanges**

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I. INTRODUCCIÓN

A continuación se expone lo que comenzó siendo un trabajo sobre los intercambios de información y ha terminado siendo un estudio sobre las bases dogmáticas y teóricas del artículo 101 TFEU.

En principio, podría parecer que estas dos cuestiones no guardan ninguna conexión entre sí. No obstante, como el lector comprenderá, existe un nexo lógico entre ambas.

Tradicionalmente, los intercambios de información se configuraron como prácticas facilitadoras de los cárteles y, como tales, permitían extraer conclusiones y mayores indicios sobre la existencia de los mismos.

No obstante, con el paso del tiempo, la Comisión Europea ha ido ampliando su relevancia, llegando a concluir que los intercambios de información pueden constituir, por sí mismos, una infracción del Derecho de la competencia. Esta nueva figura se conoce como los intercambios autónomos de información.

A grandes rasgos, el reconocimiento de esta infracción supone, de hecho, una anticipación considerable de la frontera de protección del bien jurídico protegido “competencia”. Ya no es necesario demostrar la existencia de un cártel, sino que es suficiente demostrar que el intercambio podría llevar, con toda lógica, a la formación de dicho cartel.

Ello plantea a nuestro modo ver tres grandes cuestiones (con sus múltiples derivadas) que se tratan en la presente tesis: si existe una base económica para ello, si es razonable jurídicamente ampliar la frontera de protección y, por último, si ello tiene cabida dentro del artículo 101 TFEU.

Este último precepto liga los tres elementos. Desde el momento en que se pasa a sancionar esta conducta, que anticipa la defensa del bien jurídico desde la

lesión hasta la puesta en peligro, es necesario cuestionarse el espacio vital del artículo 101 TFEU. En otras palabras, qué y hasta donde protege el artículo 101.

La presente tesis trata de responder a las tres preguntas que se planteaban anteriormente a través del estudio de la jurisprudencia del Tribunal de Justicia, los precedentes normativos del Artículo 101 TFEU, los trabajos económicos sobre colusión y, particularmente, la dogmática jurídica clásica continental.

A. La necesidad de una exégesis dogmática del artículo 101 TFUE

La presente tesis se ocupa de estudiar, en primer lugar, el artículo 101 TFUE desde una perspectiva dogmática.

Usamos aquí el término dogmático bajo su concepción continental tradicional.¹ Esto es: un análisis conceptual, histórico y sistemático que trata de comprender el sistema jurídico que se esconde tras la jurisprudencia comunitaria sobre colusión.²

¹ Larenz, K. *Metodología de la Ciencia del Derecho*. Barcelona: Ariel, 2009, página 215 y siguientes (la versión original en alemán se titula “*methodenlehre der rechtswissenschaft*”).

² El significado mismo del concepto de Sistema en la dogmática jurídica es muy debatido, e incluso entre los que coinciden en la existencia de un Sistema existen discrepancias en cuanto a su significado exacto. Véase García Amado, J.A. “Teorías del sistema jurídico y concepto de derecho” *Anuario de filosofía del derecho* 2, 1985. 297-316 (García Amado, 1985). En lo que prosigue, analizaremos el Derecho de la competencia como un Sistema desde la perspectiva de Cannaris. Esto es como un sistema abierto y en evolución caracterizado por unos principios generales a modo de directrices que guían su funcionamiento y donde existe una unidad y coherencia teleológica. Cannaris, C.W. *El sistema en la jurisprudencia*. Madrid: Fundación Cultural del Notariado, 1999 (la versión alemana se titula “*systemdenken und system begriffe in der jurisprudenzen*”).

En nuestra opinión, existen varios factores que explican la ausencia de dicho Sistema teórico en el Derecho de la Competencia. En primer lugar, la relativa juventud de este ámbito del Derecho en comparación con otras disciplinas. En segundo lugar, su difícil encaje entre el Derecho administrativo, mercantil y penal. En tercer lugar, la gran importancia que siempre se ha dado a la teoría económica por encima de otros factores y la necesidad de conceptos muy flexibles adaptados a las evoluciones cambiantes de los mercados y la política económica. En cuarto lugar, la influencia del derecho del “*common law*” y su enfoque casuístico de los problemas, junto con la

Evidentemente, todos sabemos que la ciencia jurídica no es ni perfecta ni exacta,³ y mucho menos el Derecho de la competencia. De hecho, no podemos obviar que el Derecho de la competencia debe adaptarse y funcionar en muchas culturas jurídicas diferentes.⁴ No obstante, ello no significa que no sea susceptible de un análisis jurídico crítico y sistemático.⁵

Aunque pueda parecer simplista es indubitado que toda la arquitectura jurídica del Derecho de la competencia en torno a la colusión descansa en un único artículo de los Tratados: el artículo 101 TFUE.⁶

utilización del mismo por magistrados poco acostumbrados al análisis crítico del precedente propio de los ordenamientos anglosajones.

³ (Larenz, 2009) *op. cit.* y Viehweg, T. *Tópica y Jurisprudencia*. Pamplona: Thomson-Civitas, 2007 introducción de García de Enterría: “Puede resultar paradójico que un libro como éste que reclama para la ciencia jurídica su humildad y sus limitaciones resulte a la postre liberador y ampliador de horizontes, pero estos efectos son siempre una virtud de la verdad, sea cual fuere, y no del poder y de la fuerza. No es poco librar al Derecho como ciencia de esa suerte de complejo de inferioridad que ha venido padeciendo desde que el mundo moderno perfeccionó las ciencias físicas o axiomáticas. Otro es nuestro camino y por tanto nuestra dignidad.”

⁴ Tal y como el sistema positivista continental basado en la comprensión de la norma, la búsqueda de su significado y la aplicación al caso sobre la base de la comprensión teórica de los conceptos en ella contenidos, o el sistema del “*common law*” enfocado a una visión casuística de los problemas y el desarrollo cognitivo mediante la experiencia – i.e. a través del estudio de casos con casuísticas similar para identificar principios o tópicos de aplicación regular a los mismos que se mejoran con la repetición continuada de los casos.

⁵ (Larenz, 2009) *op. cit.* pág. 221 “Lo que queremos expresar es una serie de “doctrinas” conexas entre sí acerca de lo que es Derecho vigente, que como tales pueden ser participadas, transmitidas y aceptadas como base de ulteriores reflexiones con vistas a la solución de cuestiones jurídicas concretas; es decir, que ejercen una “función de estabilización” en el sentido de Esser.” (Canaris, 1999) pág. 112 “En lo que se refiere al modo de operar del sistema en el aseguramiento de la unidad y coherencia en la obtención del derecho, su efecto puede ser tanto conservador como dinamizador y, por tanto, tanto puede obstaculizar como impulsar el desarrollo del derecho. En el primer caso una determinada solución se rechaza por “contraria al sistema”, en el segundo caso se desarrolla una solución nueva como exigida por el sistema; en el primer caso se trata en lo esencial de evitar contradicciones valorativas, en el segundo de establecer lagunas.”

⁶ Disponible en <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

Podría pensarse que ello facilita considerablemente la labor a los juristas y, sin embargo, la vasta literatura sobre la materia demuestra que, ya desde la promulgación del Tratado de Roma en 1957, las pocas oraciones recogidas en esta norma han atribulado por igual a abogados, funcionarios, magistrados y académicos.⁷

Nuestro objetivo aquí no es sugerir que el artículo 101 TFUE ha sido interpretado erróneamente desde sus comienzos. Al contrario, creemos que el artículo 101 TFUE siempre fue una cláusula general (y ambigua) de prohibición.⁸ Precisamente en ello reside su principal virtud, pues permitió que fuese promulgado por 6 países con tradiciones jurídicas muy diferentes y, posteriormente, ha facilitado su rápida adaptación a los cambios en la política del Derecho de la competencia.

El problema es que el mandato impuesto por los redactores del Tratado - en el artículo 103 TFUE (83 TCE) - de desarrollo de los principios contenidos en el artículo 101 TFEU en un régimen administrativo sancionador autónomo (con sus correspondientes infracciones y sanciones administrativas) no ha sido llevado debidamente ejecutado, ni por el Reglamento 17/62 ni por el Reglamento 1/2003.⁹

⁷ Odudu, O. "Interpreting Article 81(1): Object as Subjective Intent." *European Law Review*, 2001 disponible en <http://www.law.cam.ac.uk/faculty-resources/10008953.pdf> y la literatura allí contenida.

⁸ Esta cláusula protege el principio general de libre competencia. Utilizamos el término principio en el sentido dado por Alexy, Alexy, R. "On the Structure of Legal Principles." *Ratio Juris*. Vol. 13 No. 3 September 2000, 2000: 294-304, otros autores preferirían una categorización distinta, por ejemplo, principios en sentido estricto, (Atienza Rodríguez, M., y J. Ruiz Manero. "Sobre principios y reglas." *Doxa: Cuadernos de filosofía del derecho* 10, 1991: 101-120), o principios regulatorios, Ferrajoli, L., y J. Ruiz Manero. "Un diálogo sobre principios constitucionales." *Doxa* 34, 2012: 361-375 o cláusulas general Miquel Rodríguez, J.M. "Cláusulas generales y desarrollo judicial del Derecho." *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 1, 1997: 297-326. En cualquier caso, lo relevante es que no existe una regla (un tipo) en el sentido clásico del concepto, sobre el desarrollo desde los principios hasta las reglas (y viceversa) véase (Canaris, 1999) *op. cit.* page 66.

⁹ Como se razonará el Reglamento 1/2003 trata principalmente las cuestiones procedimentales pero por lo que se refiere a la aplicación del Artículo 101 TFEU por las Autoridades no realiza ningún

En ausencia de un régimen administrativo sancionador adecuado, lo oportuno habría sido que este se supliese mediante una revisión estricta, por parte del Tribunal de Justicia, de la práctica decisoria de la Administración para, de este modo, desarrollar un sistema de reglas ciertas y sanciones que se derivasen del artículo 101 TFUE.

Debemos comenzar, por tanto, esta tesis con una disculpa, rogando al lector que perdone el descaro de nuestros argumentos, que esperamos no ofendan a ninguna de las mentes brillantes que durante los últimos 50 años han coadyuvado al desarrollo del Derecho de la competencia en Europa.¹⁰ Dos sólidos argumentos justifican, no obstante, estas licencias.

En primer lugar, la incertidumbre constante que rodea al artículo 101 TFEU en la literatura académica respecto de cuestiones nada menores:¹¹ ¿Qué significa el Derecho de la competencia?;¹² ¿Qué son infracciones por objeto y qué por efecto?;¹³ ¿Cuál es la relación jurídica existente entre el artículo 101.1 y el

aportación sustantiva. No proporciona un nivel mayor de detalle o de especificación, simplemente renvía al intérprete del artículo 23.1 a la norma originaria, el Tratado.

¹⁰ Aun cuando el Tratado de Roma se promulgó en 1957, el Derecho Europeo de la competencia no dio sus primeros pasos hasta la aprobación del Reglamento 17/62.

¹¹ Motta, M. *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press, 2004. Bishop, S., and Walker, M. *The Economics of EC Competition Law: Concepts, Application and Measurement*. London: Sweet & Maxwell, 2010 ayudan a comprender mejor la continua incertidumbre que acompaña a la mayoría de cuestiones de índole económica en Derecho de la competencia.

¹² Lianos, I. "Some Reflections on the Question of the Goals of EU Competition Law." *CLES Working Paper Series*, 2013.

¹³ Odudu, O. "Interpreting Article 81(1): Object as Subjective Intent." *European Law Review*, 2001. El autor trató de desarrollar una interpretación coherente de la ambigua jurisprudencia sobre el significado de objeto proponiendo un polisemia (subjética y objetiva) o Lianos, I. "Collusion in Vertical Relations Under Article 81 EC." 45 *Common Market Law Review*, 2008 quien sostiene que el enfoque formalista seguido por los Tribunales se encuentra teórica y prácticamente viciado. Disponible en http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089681

101.3TFUE?;¹⁴ ¿Cuál es el significado de acuerdo y cómo se diferencia del de prácticas concertadas?¹⁵

En segundo lugar, las dudas similares que parecen existir en Luxemburgo, tal y como la reciente sentencia en *Groupement français des Cartes Bancaires* (“CB”) demuestra.¹⁶ En este asunto, el Tribunal de Justicia falló que el Tribunal General había cometido un error de derecho al concluir que una conducta concreta constituía una infracción por objeto.

En nuestra opinión, estas cuestiones reflejan claramente la necesidad de una conceptualización jurídica del artículo 101 TFUE. Después de todo, si esta norma ha estado en vigor 50 años, cómo es posible que el Tribunal General se equivoque en algo tan básico y, más aún, cómo es posible que existan tantas preguntas sin respuesta.

Esta tesis ofrece una contestación sencilla pero contundente: el motivo último de estos problemas se debe a que los fundamentos jurídicos del artículo 101 TFUE (al contrario que los económicos) no han sido adecuadamente estudiados y desarrollados, todavía.¹⁷

¹⁴ Faull, J., and A. Nikpay. *The EU Law of Competition*. Oxford: OUP, 2014.

¹⁵ Wish, Richard. *Competition Law*. Oxford University Press, 2012. Bellamy & Child. *European Community Law of Competition*. Oxford: OUP, 2008. Ghezzi, F., and M. Maggolino. "Bridging EU Concerted Practices with U.S. Concerted Actions." *10 Journal of Competition Law and Economics* 3, 2014 quienes afirman: “On the theoretical level, EU antitrust institutions have always struggled to defined the three notions of agreements, decision by associations of undertakings and concerted practices separately one form the other”.

¹⁶ C-67/13 P, *Groupement des cartes bancaires (CB) c. Comisión*, sentencia de 11 de septiembre de 2014, en adelante “CB”.

¹⁷ Una de las conclusiones que se desprende de nuestra investigación es que el Derecho de la competencia se ha visto fuertemente expuesto a la teoría económica, más que a otras ramas del Derecho (como el Derecho penal o administrativo). El resultado ha sido la utilización de dos lenguajes (el jurídico y el económico) que no comparten el mismo vocabulario y que no persiguen los mismos fines.

Ahora bien, no se trata, sin embargo, de un error achacable a los padres del Tratado, ellos eran perfectamente conscientes de que el artículo 101 TFUE era una norma imprecisa y sin una base teórica jurídica sólida, tenía que serlo para ser aprobada.

Como demostraremos, la raíz del problema se sitúa en la promulgación del Reglamento 17/62 y la jurisprudencia consiguiente y se agrava con la aprobación del Reglamento 1/2003, particularmente, cuando la prohibición (y sanción) de los cárteles (secretos) se convirtió en una prioridad para la Comisión Europea.

En aquel tiempo, los esfuerzos de las Autoridades (tanto en Bruselas como en Luxemburgo), se centraron en la mejor comprensión de la literatura económica sobre organización industrial y microeconomía,¹⁸ en lugar de tratar de proporcionar al artículo 101 TFUE, las bases teóricas que siempre había necesitado.¹⁹

La presente tesis trata de revertir esta tendencia mediante una interpretación dogmática del artículo 101 TFEU, a través de las aportaciones realizadas por la doctrina administrativa, penal y constitucional continental.

¹⁸ Nótese que el puesto del Economista Jefe se creó en septiembre de 2003. Para más información sobre el mismo, véase Roller, L. H., y P. A. Buigues. "The Office of the Chief Competition Economist." *European Commission*, 2005. Una explicación de cómo este puesto se creó tras las decisiones del Tribunal de Justicia en *Airtours*, *Tetra Laval* y *Schneider*, véase Lianos, I., and D. Geradin. *Handbook on European Competition Law: Enforcement and Procedure*. Edward Elgar Publishing, 2013, pág. 310.

¹⁹ La siguiente cita de la Comisión Europea en el "White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty" es muy reveladora: "*The reform proposed in this White Paper, namely the introduction of such a directly applicable exception system, has three main elements: the ending of the system of notification and authorisation, decentralised application of the competition rules, and intensified ex post control. The approach taken to the application of Article 85 will continue to be rigorously economic.*"

Con ello esperamos que el lector se convenza, al final de la tesis, de que éstas pueden resultar, al menos, de igual importancia, para el desarrollo del Derecho de la competencia, que la teoría microeconómica.²⁰

B. Estructura

La presente tesis se divide en tres bloques temáticos que persiguen resolver las tres preguntas formuladas al comienzo. Estos son: un estudio abstracto de la naturaleza jurídica y el funcionamiento sistemático del artículo 101 TFUE (parte I); un estudio de las bases económicas de los intercambios de información autónomos, junto con su encaje actual en el artículo 101 TFUE (parte II); y, por último, una propuesta que propugna una interpretación del artículo 101 TFEU que permitiría la prohibición sin sanción de los intercambios de información como prácticas autónomas, de manera conforme con los principios rectores de un sistema administrativo sancionador (parte III).

En la primera parte, exploramos los orígenes del artículo 101 TFUE y tratamos de comprender la naturaleza jurídica de la norma con la ayuda de las herramientas clásicas de la dogmática jurídica continental.

Aquí demostraremos como existe una distinción fundamental, que no ha sido adecuadamente identificada, entre la aplicación del artículo 101 TFEU como una cláusula general de prohibición, por un lado, y la imposición de sanciones, como consecuencia de la infracción del artículo 101 TFUE (a resultas la remisión del artículo 23.2.a) del Reglamento 1/2003), por otro.

Esta distinción deviene crucial en tanto que existen conductas que pueden quedar englobadas dentro de la cláusula general y, por tanto, ser prohibidas, pero

²⁰ Si el Derecho de la competencia se ha utilizado como herramienta intelectual para analizar otros campos del derecho, véase Rock, E. "Corporate Law through an Antitrust Lens." 92 *Colum. L. Rev.*, 1992, no vemos porque no debería intentarse el mismo proceso a la inversa. Véase Alfaro, J. "El Proceso de Configuración del Derecho de la competencia a la luz de la doctrina del Tribunal de Justicia de la Unión Europea." *eXtoikos* (eXtoikos), 2014.

que no pueden subsumirse (y por tanto ser sancionadas) dentro de los tipos administrativos infractores que desarrollan el artículo 101 TFUE.

En la segunda parte, analizamos una de las infracciones del artículo 101 TFUE más controvertidas: los intercambios autónomos de información. Esta parte se divide en dos bloques temáticos.

Primero, realizamos un análisis descriptivo de la teoría económica sobre los intercambios de información. Demostraremos que existen razones para pensar que se pueden extraer inferencias sólidas sobre el posible resultado anticompetitivo de determinados intercambios de información. No obstante, también expondremos las dificultades que existen en la mayoría de casos de calificar un intercambio de información como pro-competitivo o infra-competitivo ex ante.

Posteriormente, exploramos la jurisprudencia del Tribunal de Justicia para comprender su encaje en el Artículo 101 TFUE. En esta sección expondremos como el concepto amplio de intercambio de información se desarrolló y amplió (junto con el de prácticas concertadas) en un contexto muy concreto: el de la lucha contra los cárteles secretos, largos y complejos.

Demostraremos, además, como esta jurisprudencia se trasladó posteriormente a los intercambios de información como infracciones autónomas, sin un análisis crítico, convirtiendo esta infracción en un cajón de sastre de todo comportamiento mínimamente colusorio, distorsionando de este modo el significado jurídico de concertación o coordinación.²¹

²¹ En esta línea, véase (Ghezzi & Maggolino, 2014) *op. cit.* “the EU institutions have always wanted to frame the class of concerted practices as a catch-all device to grasp the species of collusion that do not amount to agreements” y la nota al pie 9 explicando la Decisión IV/31.149, 1986 O.J. L 230, § 87, donde la Comisión argumentó que el concepto de práctica concertada es una herramienta “to forestall the possibility of undertakings evading the application of Article [101] by colluding in an anticompetitive manner falling short of a definite agreement”.

En la tercera parte, proporcionamos los que, en nuestra opinión, deberían ser los parámetros clave en el análisis de los intercambios de información como prácticas autónomas.

En esta sección explicamos una serie de conceptos clásicos de todo sistema sancionador: a) los diferentes bienes jurídicos que tratan de proteger los sistemas penales o administrativos (individuales o colectivos); b) los mecanismos para protegerlos (delitos de peligro o de daño), y c) los principios que deberían guiar la aplicación los mismos (culpabilidad, lesividad y legalidad).

Mediante la comprensión de estos conceptos razonamos porqué, en nuestra opinión, puede concluirse que el artículo 101 TFUE previene, en la mayor parte de casos, delitos de peligro, esto es, conductas que siendo peligrosas no son necesariamente dañinas.²²

Como corolario de lo anterior, justificamos, por un lado, porqué únicamente en aquellos casos en que exista un daño evidente, o la proximidad al daño sea más que obvia, resulta adecuado imponer una sanción administrativa y, por otro, porqué en la mayoría de casos, la reacción de las Autoridades deberá limitarse a la adopción de medidas de restablecimiento de la legalidad (por ejemplo, mediante medidas de cesación).

Por último, exponemos como la traslación de este marco jurídico a los intercambios de información, como infracciones autónomas, proporciona un método alternativo de análisis jurídico de los mismos. Esto es, como conductas infractoras de la cláusula general del artículo 101 TFUE pero no necesariamente en la aplicación sancionatoria del artículo 23 Reglamento 1/2003. Por ello, concluimos que, en muchos casos, los intercambios autónomos de información deberán ser prohibidos pero no sancionados.

²² Véase Immenga, U., y E.J. Mestmäcker. Wettbewerbsrecht, Band 1. EU, Teil 2. Munich: C.H. Beck, 2012, pág. 407 “Daher handelt es sich bei Art. 23 Abs. 2 Unterabs. 1 lit. a i. V.m. Art. 81 Abs. 1 EG (jetzt: Art. 101 Abs. 1 AEUV) um ein Tätigkeitsdelikt in der Form eines abstrakten Gefährdungsdelikts.”

C. Nuestras conclusiones

Primera, las consecuencias jurídicas que se derivan del Artículo 101 TFUE (como cláusula general) y las que se derivan de la infracción del Artículo 101 TFUE como infracción administrativa (por la remisión del Artículo 23.2.a) del Reglamento 1/2003) no deben confundirse.

En efecto, la primera es una cláusula prohibitiva que acarrea la sanción civil de nulidad, mientras que la segunda es un tipo de infracción administrativa con su correspondiente sanción.

Existen, por lo tanto, dos consecuencias jurídicas distintas asociadas a la infracción del Artículo 101 TFUE, la nulidad establecida en el artículo 101.2 TFUE y la sanción administrativa fijada en el Artículo 23 del Reglamento 1/2003.

La interacción entre estas dos consecuencias jurídicas es compleja. El artículo 101.1 TFUE es, en primer lugar, una cláusula general de prohibición, tanto desde la perspectiva sistemática como histórica. Sin embargo, los redactores del Tratado previeron que, conforme se fuese instaurando una cultura de la competencia en Europa, determinadas infracciones del artículo 101 TFUE resultarían tan flagrantes, tan dañinas para la competencia, que deberían ser sancionadas, dado el riesgo que generarían y la necesidad de disuasión de las mismas. Este es el mandato que se contiene en el artículo 103 TFUE.

De lo anterior se desprende es que existen determinadas conductas infractoras - que necesariamente se engloban en el artículo 101 TFUE - que merecen una sanción mayor que la mera consecuencia civil de nulidad. El mayor problema que plantea, por tanto, el artículo 23.2.a) del Reglamento 1/2003 es que no define expresamente las conductas que deberían entenderse englobadas en esta interpretación más protectora del artículo 101 TFUE o, al menos, qué requisitos deberían guiar a las Autoridades a la hora de determinar el nivel de

reproche jurídico adecuado para cada infracción específica del artículo 101 TFUE.

En otras palabras, cualquier conducta que infringe el Artículo 23.2.a) y por lo tanto acarrea una sanción administrativa es necesariamente una infracción del artículo 101 TFUE en sentido amplio y exige la imposición de la sanción civil. Sin embargo, no toda infracción del artículo 101 TFUE debe acarrear necesariamente la sanción administrativa prevista en el artículo 23.2.a) del Reglamento 1/2003.

Dicho de otra manera, no toda conducta que amenaza a la competencia necesita ser castigada, únicamente aquellas que claramente tiene ese efecto sobre la base de una experiencia previa pueden serlo. El resto de conductas que por su objeto o sus efectos (y utilizamos estos términos deliberadamente) puedan prevenir o distorsionar la competencia simplemente deben ser prohibidas.

La ausencia de un marco normativo expreso, detallando los criterios para distinguir qué conductas deben entenderse englobadas en el artículo 23.2.a) del Reglamento 1/2003, obliga a los Tribunales Europeos a desarrollar una serie de reglas que permitan una aplicación del Derecho de la competencia acorde a los principios de legalidad, seguridad jurídica, lesividad y culpabilidad.

Esta conclusión conlleva, a su vez, dos reflexiones jurídicas de gran interés.

Por un lado, las sanciones monetarias²³ - previstas en el artículo 23 del Reglamento 1/2003 – son la consecuencia jurídica (sanción administrativa)

²³ La Comisión ha señalado que el propósito de las multas es doble “*the purpose of fines is twofold: to impose a pecuniary sanction on the undertaking for the violation and prevent a repetition of the offence, and to make the prohibition in the Treaty more effective*”, véase el décimo tercer informe de política de Competencia 1983 para 62. Wils, W. *The optimal enforcement of EC antitrust law: essays in law & economics*. The Hague: Kluwer International, 2002.pág. 13.

impuesta por el sistema como resultado de la infracción de un tipo administrativo y, por tanto, deben ser impuestas de conformidad con los principios desarrollados por el Derecho administrativo sancionador.²⁴ Ello supone, al menos, que éstas deben ser graduadas en función del riesgo que presentan para la competencia (lesividad), así como la voluntad subjetiva o negligencia de las partes involucradas (culpabilidad).²⁵

Por otro, el artículo 101 TFUE puede y debe ser aplicado como una cláusula general de prohibición sin necesidad de recurrir al artículo 23 del Reglamento 1/2003. En otras palabras, su carácter imperativo conlleva que pueda, y deba, ser usado por las Autoridades de competencia para imponer medidas de prohibición/cesación.²⁶

²⁴ Huergo Lora, A. *Las Sanciones Administrativas*. Madrid: Iustel, 2007.

²⁵ Wils, W. "Optimal Antitrust Fines: Theory and Practice." 29 *World Competition* 2, 2006: "With regard to the first task of clarifying the content of the antitrust prohibitions, fines do not appear to play a significant role" and footnote 35 "Indeed, in those cases where a competition authority would take a decision or bring a prosecution so as to clarify that a certain behaviour, the illegality of which was previously not clear, violates the antitrust prohibitions, the imposition of a fine would legally not be possible. In the case of fines imposed by the European Commission for violation of Articles 81 or 82 EC, the 'intent or negligence' required by Article 23(2) of Regulation No 1/2003, as note 6 above, would be lacking; see also Judgment of the EC Court of First Instance of 30 September 2003 in Joined Cases T-191/98 etc. *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraphs 1611 to 1633."

²⁶ En esencia, el razonamiento es que del artículo 101 TFUE se extrae una cláusula general y una infracción administrativa como resultado del incorrecto uso de los poderes conferidos por el artículo 103 TFUE. El principio general incorpora únicamente la prohibición y por tanto la facultad de cesación (artículos 101.1 and 101.2 TFUE) lo que, permite, una aplicación regulatoria (*ex ante*), mientras que la infracción administrativa (artículo 23 del Reglamento 1/2003) se aplica *ex post*. Esta distinción es más evidente en el derecho antitrust norteamericano dado los diferentes (aunque confusos) roles de la FTC (como regulador) y el DoJ (como fiscalizador) respectivamente.

Véase entre otros Kovacic, W. y M. Winerman. "Competition Policy and the Application of Section 5 of the Federal Trade Commission Act." 20 *Minn. J. Int'l L.* 274, 2010: 1001-1022. Cooper, J. "The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act." *George Mason University Law and Economics Research Papers*, 2014 and Hovenkamp, H. "The Federal Trade Commission and The Sherman Act." *Florida Law Review*, Vol. 62, 2010.

En otras palabras, no todas las infracciones del artículo 101 TFEU deben acarrear una sanción administrativa, puesto que el Artículo 101 TFEU no comparte la misma naturaleza jurídica que el Artículo 23 del Reglamento 1/2003.

Si bien la norma primigenia del artículo 23.2.a) del Reglamento es indudablemente el artículo 101 TFUE, su ámbito de aplicación es distinto. El artículo 23.2.a) del Reglamento 1/2003 nos dice que existen determinadas conductas que infringen el artículo 101 TFUE de una manera tan patente que deben ser sancionadas económicamente.

En conclusión, todo ello asevera que las Administraciones disponen de un amplio margen de maniobra en la toma de decisiones, siempre y cuando sean congruentes con las consecuencias jurídicas impuestas como resultado de las conductas bajo investigación.

En segundo lugar, para poder coludir, las empresas deben llevar a cabo actos preparatorios que, dependiendo de las circunstancias, deberán ser sancionados con multas menores que la colusión o incluso no sancionados.²⁷ En otras palabras, todo crimen puede ser cometido, pero también preparado (diseñado) o intentado, ¿por qué debería ser distinto para las infracciones del Derecho de la competencia?

Como demostraremos, la mayoría de infracciones del artículo 101 TFUE son delitos de peligro. El infractor no es sancionado por el daño concreto causado a unos individuos específicos. En su lugar, el malhechor es reprendido por el

De manera análoga en Suiza con el tratamiento dado al asunto ASCOPA, véase Alfaro, J. “Como se analiza un intercambio de información o qué bien legislan los suizos: Caso suizo de cosmética de lujo.” *Blog Derecho Mercantil*, February 23, 2012.

²⁷ En cierta manera, se podría decir que seguimos el camino abierto por (Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, 2013) *op. cit.* donde afirma “*defining the contours of what constitutes true unilateral conduct is essential in order to define the concept of antitrust agreement and not the opposite*”.

peligro, más o menos cierto, que su conducta causa a la “competencia” como bien jurídico protegido.²⁸

Los intercambios de información van un paso más allá, ampliando el campo de protección del bien jurídico “competencia” a aquellas prácticas que pueden facilitar la creación de dicho riesgo. Como tales, creemos firmemente que deben ser sancionadas siguiendo unos criterios muy precisos.

En tercer lugar, la traslación de estas observaciones al campo de los intercambios de información lleva a la conclusión de que existe una base teórica suficiente para incorporar una doctrina de la “invitación a coludir” que prevendría la divulgación unilateral de información que, aunque constituye un supuesto muy peligroso, no encaja bien en el significado tradicional de coordinación utilizado por la jurisprudencia.²⁹

²⁸ Schaub, A. "Working Paper X." In *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, by C. Ehlermann, & I. Atanasiu. Oxford: Hart Publishing, 2001 pág. 247 “It is clear from the very content of the Treaty that effective competition constitutes a public good that must be protected”. Schaub era el Director General de Competencia en aquella época.

²⁹ Véase la interesante conversación entre el Abogado General Mayras en *Dyestuffs* y el Abogado General Vesterdorf en *Rhône-Poulenc* (*infra* note 449), II-934 “In a later section, devoted to the adverse effect on competition, Mr Advocate General Mayras further stated (p. 682, right-hand column) : 'However, there are some academic writers who say, attaching particular importance to objective factors in defining the concept of a concerted practice, that to fall under Article 85 such a practice must actually and concretely have had the effect of altering the conditions of competition. In his opinion on the *Chemiefarma* case, Mr Advocate General Gand seemed to take the same view. He said I have already given you to understand that my opinion is not very far removed from that expressed in those words. Would it be possible to go further and to take into consideration not the result, the actual effect of the practice, but also its potential effect} There can be no doubt that it would seem curious for a concerted practice which has not had any material effect on the competitive situation, despite the intention of the participants and because of circumstances beyond their control, to escape the application of Article 85.1 should be tempted to say that in such a case merely to attempt or to initiate execution would be enough to justify the application of Article 85(1).' **What is interesting about that argument for the purposes of the present cases is that Mr. Advocate General Mayras tries to introduce a doctrine of attempt into the concept of concerted practice as used in Article 85(1).** However, the theory ventured by him has not been supported or commented upon in later judgments of the Court of Justice or by its Advocates General.”

Esta doctrina de la “invitación a coludir” evitaría que las Autoridades y los Tribunales tuviesen que continuar ampliando el significado de coordinación más allá de los límites de lo razonable. Asimismo, resultaría plenamente coherente con una interpretación amplia del artículo 101 TFUE, como cláusula general, siempre y cuando la consecuencia jurídica derivada de la infracción se circunscribiese a la imposición de órdenes de cesación.³⁰

En conjunto, creemos que una mejor comprensión del artículo 101 TFUE puede ayudarnos a lidiar con aquellos casos que se encuentran en los límites de la norma, tales como los intercambios de información y que, precisamente por ello ayudan a cohonestar la norma con el sistema jurídico en el que se inserta.³¹

Dicho de otra manera, existe un modo distinto de conceptualizar jurídicamente los intercambios de información, lo que a su vez mejorará nuestra comprensión de las prácticas concertadas y, en último, lugar del artículo 101 TFUE.

De hecho, esta propuesta no es tan original. En 1953 cuando el Gobierno francés promulgó el Decreto, cuya redacción se considera uno de los precedentes del artículo 101 TFEU, incluyó expresamente la siguiente mención: “*Est assimilé à la pratique des prix illicites le fait: (...) 3° Par toute personne responsable d’une action concertée de se livrer ou d’inciter à se livrer à une pratique prohibée para l’article 59 bis de la présente ordonnance*” http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19530810&pageDebut=07045&pageFin=&pageCourante=07046

³⁰ Esta no es una propuesta tan drástica si se considera que esto es precisamente lo que sucede en la mayoría de casos de terminación convencional (compromisos). De hecho, durante las conversaciones previas a la modernización, el Libro Blanco reconoció la posibilidad de que la Comisión fuese más allá de la imposición de sanciones en la toma de decisiones:

“It is true that the Commission would no longer adopt exemption decisions under Article 85(3) as it does now, but it should nevertheless be able to adopt individual decisions that are not prohibition decisions. Where a transaction raises a question that is new, it may be necessary to provide the market with guidance regarding the Commission’s approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest.”

³¹ (Canaris, 1999) *op. cit.* Después de todo, debemos plantearnos cómo es posible que la misma conducta – intercambiar información – admita prácticamente cualquier caracterización jurídica en derecho de la Competencia. O, cómo, hechos similares pueden dar lugar a conclusiones distintas dependiendo de la autoridad a cargo de la investigación, o incluso, cómo es posible que una única divulgación unilateral de información de lugar a una infracción por objeto.

I. INTRODUCTION

In what follows we record what began as an investigation of information exchanges under EU competition law and ended up becoming a dogmatic and theoretical study of Article 101 TFEU.

At first sight, one could think that there is no link between these two issues. However, as the reader will understand while reading these pages, there is a logical nexus among them.

Traditionally, information exchanges were configured as facilitating practices of a cartel or other collusive arrangements. As such, jointly with other evidence, they allowed making inferences and drawing conclusions about the existence of a collusive agreement or concerted practice.

However, as time passed (and a culture of competition settled down in Europe), the European Commission has broadened their area of influence. Today, information exchanges can, on themselves, amount to a competition law infringement. These are called “self-standing information exchanges”.

The upbringing of such an infringement implies, *de facto*, advancing the red lines that safeguard Article 101 TFEU. It is no longer necessary to show the existence of a cartel, it merely suffices showing that the exchange (or disclosure) could most logically end up in a cartel, for the practice to be prohibited and punished.

To our mind, this raises three fundamental questions: is there an economic basis for such conclusion? Is it legally reasonable to do so? And more importantly, how does this infringement fit within the wording of Article 101 TFEU?

This last question links the two key themes of the dissertation. From the moment that there is an infringement that sanctions the risk inflicted to competition rather than the harm actually caused, we must question ourselves, what and how is that Article 101 protects.

This thesis answers the three questions posed above by reference to the case law of the ECJ, the historical precedents of Article 101 TFEU, the economic studies on collusion and, particularly, the use of the classic continental legal theory.

A. The need for a dogmatic exegesis of Article 101 TFEU

This dissertation devotes a considerable effort to study Article 101 of the Treaty Functioning of the European Union (“TFEU”) from a dogmatic perspective.

We use dogmatic in the traditional “continental” legal sense of the word.³² This means: a conceptual, historical and systematic analysis that seeks to define and understand the legal system behind the competition law jurisprudence on collusion.³³

³² Larenz, K. *Metodología de la Ciencia del Derecho*. Barcelona: Ariel, 2009, page 215 and seq. (the German version is titled “*methodenlehre der rechtswissenschaft*”).

³³ The concept of a system within the law is, in itself very debated, and even within those that agree that there is a system, there are discrepancies about the exact meaning of such a system. See García Amado, J.A. “Teorías del sistema jurídico y concepto de derecho” *Anuario de filosofía del derecho* 2, 1985. 297-316 (García Amado, 1985) In what follows, we envision the competition law system as a whole and as part of the rule of law from Cannaris’ perception. That is as an open and evolving system, characterized by guiding general principles and where there must be a teleological coherence and unity. Canaris, C.W. *El sistema en la jurisprudencia*. Madrid: Fundación Cultural del Notariado, 1999 (the German version is titled “*systemdenken und system begriffe in der jurisprudenz*”).

In our opinion, several factors which might explain the lack of such a theory in competition law yet. First and foremost, the relative youth of the subject as opposed to other fields of the law. Secondly, its unclear placing between administrative, corporate and criminal law. Thirdly, the role played by economic theory in competition law and the Public Authorities’ need to adapt to evolving market circumstances. Fourthly, the influence of the common law and the case law

Obviously, we all know that the legal science is not perfect or exact,³⁴ and even less competition law. In fact, we cannot disregard that EU competition law has to adapt and work in many different legal cultures.³⁵ However, it is still amenable and it should be subject to critical and systematic legal reasoning.³⁶

Even if it sounds simplistic, it is undisputed that the whole European Competition law architecture on collusion rests, ultimately, just on one Article of the Treaties: Article 101.³⁷

One would think that this facilitates the job for competition practitioners and, yet, the vast legal literature on collusion reveals that, ever since the

approach to competition law coupled with magistrates unaccustomed to this system, which has resulted in a tendency to follow precedents without the proper critical analysis.

³⁴ (Larenz, 2009) *op. cit.* and Viehweg, T. *Tópica y Jurisprudencia*. Pamplona: Thomson-Civitas, 2007 foreword by García de Enterría: “Puede resultar paradójico que un libro como éste que reclama para la ciencia jurídica su humildad y sus limitaciones resulte a la postre liberador y ampliador de horizontes, pero estos efectos son siempre una virtud de la verdad, sea cual fuere, y no del poder y de la fuerza. No es poco librar al Derecho como ciencia de esa suerte de complejo de inferioridad que ha venido padeciendo desde que el mundo moderno perfeccionó las ciencias físicas o axiomáticas. Otro es nuestro camino y por tanto nuestra dignidad.”

³⁵ Such as the civil (positivist) one based on the understanding of the norm, the search for its meaning and its application to the facts based on the theoretical meaning of the concepts embedded in the norm, or the common law (casuistic) approach based on the process of learning by practice- i.e. through the study of cases sharing similar fact patterns in search for principles or topics that can be applied regularly to them and tuned thanks to their recurring occurrence.

³⁶ (Larenz, 2009) *op. cit.* page 221 “Lo que queremos expresar es una serie de “doctrinas” conexas entre sí acerca de lo que es Derecho vigente, que como tales pueden ser participadas, transmitidas y aceptadas como base de ulteriores reflexiones con vistas a la solución de cuestiones jurídicas concretas; es decir, que ejercen una “función de estabilización” en el sentido de Esser.” (Canaris, 1999) page 112 “En lo que se refiere al modo de operar del sistema en el aseguramiento de la unidad y coherencia en la obtención del derecho, su efecto puede ser tanto conservador como dinamizador y, por tanto, tanto puede obstaculizar como impulsar el desarrollo del derecho. En el primer caso una determinada solución se rechaza por “contraria al sistema”, en el segundo caso se desarrolla una solución nueva como exigida por el sistema; en el primer caso se trata en lo esencial de evitar contradicciones valorativas, en el segundo de establecer lagunas.”

³⁷ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

enactment of the Treaty of Rome in 1957, the few sentences contained in this norm have troubled lawyers, officials, professors and magistrates alike.³⁸

Our purpose is not to argue that Article 101 TFEU has been misinterpreted ever since its enactment. On the contrary, our position is that Article 101 TFEU has always been a general (prohibitive) clause.³⁹ This, rather than an imperfection, is one of its strengths as it has allowed it, first, to get approved by six States with very different legal traditions and, secondly, to adapt to the changes in the understanding of competition law and competition enforcement.

The problem is that the drafter's mandate – contained in Article 103 TFEU (83 TEC) - to develop the principles embedded in Article 101 TFEU into an administrative sanctioning system (with its corresponding rules and sanctions), has not been adequately fulfilled either by Regulation 17/62 or by Regulation 1/2003.⁴⁰

In the absence of a properly developed system of administrative sanctioning rules, this required a strict review by the ECJ of the Commission's practice (before clearly setting out rules and sanctions derived from Article 101 TFEU), which has not happened either.

³⁸ Odudu, O. "Interpreting Article 81(1): Object as Subjective Intent." *European Law Review*, 2001 available at <http://www.law.cam.ac.uk/faculty-resources/10008953.pdf> and the literature contained therein.

³⁹ We use the term principle in Alexy's sense, Alexy, R. "On the Structure of Legal Principles." *Ratio Juris*. Vol. 13 No. 3 September 2000, 2000: 294-304, other authors would prefer a different categorization such as a principle in strict sense (Atienza Rodríguez, M., and J. Ruiz Manero. "Sobre principios y reglas." *Doxa: Cuadernos de filosofía del derecho* 10, 1991: 101-120), regulatory principles, Ferrajoli, L., and J. Ruiz Manero. "Un diálogo sobre principios constitucionales." *Doxa* 34, 2012: 361-375 or general clauses Miquel Rodríguez, J.M. "Cláusulas generales y desarrollo judicial del Derecho." *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 1, 1997: 297-326. In any event, the key aspect is that it is not certainly a rule in classic sense, on the development of the law from principles to rules (and viceversa) see (Canaris, 1999) *op. cit.* page 66.

⁴⁰ As we will explain Regulation 1/2003 merely deals with procedural aspects but with regards to the enforcement of Article 101 TFEU, it does not deal with the "substance" of it. It does not provide a further layer of specificity; it merely forwards the interpreter back to the original norm.

We hope that our investigation - in search of a better conceptualization of Article 101 TFEU - does not affront any of those great minds who have been involved in the process of shaping competition law in Europe in the last 50 years,⁴¹ and we sincerely apologize in advance for our boldness. In our defense, we can only wield two arguments.

First, the continuous uncertainty that still surrounds Article 101 TFEU in academic writings,⁴² regarding issues which are far from secondary: What does competition mean?;⁴³ what are infringements object and infringements by effect?;⁴⁴ what is the relationship between Article 101.1 and 101.3 TFEU?;⁴⁵ what is the meaning of agreement and how does it differentiate from that of concerted practices?⁴⁶

⁴¹ Even though the Treaty of Rome was enacted in 1957, European Competition Law as such did not start to develop until Regulation 17/62 was enacted.

⁴² Motta, M. *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press, 2004. Bishop, S., and Walker, M. *The Economics of EC Competition Law: Concepts, Application and Measurement*. London: Sweet & Maxwell, 2010 to get a flavor of this continuous uncertainty with regards to some of economic questions that surround competition law.

⁴³, I. "Some Reflections on the Question of the Goals of EU Competition Law." *CLES Working Paper Series*, 2013.

⁴⁴ Odudu, O. "Interpreting Article 81(1): Object as Subjective Intent." *European Law Review*, 2001. the author tried to develop for a consistent interpretation on the ambiguous case law on the meaning of "object" suggesting a double interpretation (subjective and objective) or Lianos, I. "Collusion in Vertical Relations Under Article 81 EC." 45 *Common Market Law Review*, 2008. arguing that the formalistic approach currently followed by the Courts in defining the concept of agreement under Article 81 EC is theoretically and practically flawed. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089681

⁴⁵ Faull, J., and A. Nikpay. *The EU Law of Competition*. Oxford: OUP, 2014.

⁴⁶ Wish, Richard. *Competition Law*. Oxford University Press, 2012. Bellamy & Child. *European Community Law of Competition*. Oxford: OUP, 2008. Ghezzi, F., and M. Maggolino. "Bridging EU Concerted Practices with U.S. Concerted Actions." 10 *Journal of Competition Law and Economics* 3, 2014 pointing out:

"On the theoretical level, EU antitrust institutions have always struggled to defined the three notions of agreements, decision by associations of undertakings and concerted practices separately one from the other".

Secondly, the similar hesitation in Luxemburg, as the recent judgment of the ECJ in *Groupeement français des Cartes Bancaires* (“CB”) demonstrates.⁴⁷ In this case, the ECJ ruled that the General Court committed an error of law, in finding that an infringement had been an “infringement by object”.

We believe that these issues clearly reflect the need for a legal conceptualization of Article 101 TFEU. After all, if this norm has been in use for 50 years, how can the General Court get something so basic wrong? And how is it possible that so many conceptual questions have not been resolved yet?

We offer a simple but strong answer, because the legal theoretical foundations (as opposed to the economic ones) have not been clearly developed yet.⁴⁸

This was not a mistake committed by the drafters of the Treaty, they knew perfectly that Article 101 TFEU was imprecise and lack solid legal foundations; it had to be to get passed.

As we will demonstrate, the problem started with Regulation 17/62 and the case law that applied it initially but, particularly, when Regulation 1/2003 was enacted and cartel enforcement truly became a policy priority in Brussels.

At that time, the efforts in Brussels and Luxembourg were directed towards understanding industrial theory and microeconomics,⁴⁹ rather than

⁴⁷ C-67/13 P, *Groupeement des cartes bancaires (CB) v. Commission*, judgment of 11 September 2014. Hereinafter “CB”.

⁴⁸ One of the inferences that arises from our research is that competition law has been heavily influenced by economic theory and less by other fields of the law (such as criminal or administrative law). The result has been the use of two different languages (legal and economic) which do not use the same vocabulary and which are not guided by the same principles or goals.

⁴⁹ Note that the position of the Chief Economist has been in place since September 2003. For more information on this position see Roller, L. H., and P. A. Buigues. “The Office of the Chief Competition Economist.” *European Commission*, 2005. For an explanation on how this post was created after the Court judgments in *Airtours*, *Tetra Laval* and *Schneider* see Lianos, I., and D.

providing Article 101 TFEU with the legal theoretical foundations that it always required.⁵⁰

This thesis relies greatly in several areas of continental law, such as criminal, administrative and constitutional law, and its traditional literal, historical and systematic methods of interpretation to shift this trend.

We hope that by the end of this thesis, the reader will be convinced that they can be, at the very least, of the same importance to competition law as microeconomic theory.⁵¹

B. The structure of this dissertation

This thesis is divided in three main blocks which seek to answer the three key questions described above: an abstract study on the legal nature and systematic of Article 101 TFEU; a study on the economic foundations of information exchanges as a self-standing infringements, jointly with its current fitting within Article 101 TFEU according to the ECJ's case law, and, ultimately, a proposal for a new approach to self-standing information exchanges coherent with the legal nature of Article 101 TFEU and the basic tenets of a (quasi-criminal) sanctioning system.

Geradin. *Handbook on European Competition Law: Enforcement and Procedure*. Edward Elgar Publishing, 2013, page 310.

⁵⁰ The following quote from the European Commission, "White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty" is quite telling "*The reform proposed in this White Paper, namely the introduction of such a directly applicable exception system, has three main elements: the ending of the system of notification and authorisation, decentralised application of the competition rules, and intensified ex post control. The approach taken to the application of Article 85 will continue to be rigorously economic.*"

⁵¹ If competition law has been used as an intellectual tool to analyze other fields of the law, see Rock, E. "Corporate Law through an Antitrust Lens." *92 Colum. L. Rev.*, 1992, we see no reason why the opposite should not be, at the very least, tried. See Alfaro, J. "El Proceso de Configuración del Derecho de la Competencia a la luz de la doctrina del Tribunal de Justicia de la Unión Europea." *eXtoikos* (eXtoikos), 2014.

In the first part, we explore the origins of Article 101 TFEU and seek to understand the legal nature of the norm by using the intellectual tools developed in continental law theory.

We will prove how there is key distinction between the general prohibitive clause (Article 101 TFEU) and the administrative (quasi-criminal) sanction (Article 23 of Regulation 1/2003) which has not been properly identified in the case law of the ECJ.

This distinction is crucial as there might be conducts which fall under the general clause and, therefore, shall be prohibited but do not fit necessarily within any specific rules (administrative sanctions) that develop it and, as a result, cannot (and shall not) be fined monetarily.

In the second part, we analyze one of the most controversial Article 101 TFEU infringements: self-standing information exchanges. This part is divided in two main blocks.

First, we undertake a descriptive analysis on the economics of information exchanges. We will demonstrate that there are grounds to believe that strong inferences can be made about the possible anticompetitive results of certain information exchanges. However, we will also show the difficulties in categorizing most information exchanges *ex ante* as procompetitive or anticompetitive, from an economic perspective.

Secondly, we explore the ECJ case law on information exchanges to understand its current fitting within Article 101 TFEU. We will show how the “general concept” of information exchanges developed and expanded (jointly with the concept of concerted practices) in a very particular context: the ECJ’s case law against long and complex cartels.

Unfortunately, this case law was later applied in the field of self-standing information exchanges, transforming this infringement into a catch-all concept for

any behavior “sort of collusive”, and distorting, along the way, the meaning of concertation or coordination.⁵²

In the third part, we provide what, in our opinion, should be the key parameters when assessing self-standing information exchanges as an Article 101 TFEU infringement.

We will explore: a) the different types of values which are protected by any administrative or criminal system (individual or collective); b) the mechanisms to protect them (crimes of harm or risk offences), and the principles that should guide the authorities’ enforcement (culpability, harm and legality).

Through the application of these basic concepts, we reach the conclusion that Article 101 TFEU prevents in most cases, risk offences, i.e. conducts which are dangerous but not necessarily harmful.⁵³

As result, only in those cases where there is an actual harm or where the proximity of the harm is more than obvious, it might be appropriate to impose an administrative sanction, whereas the remaining cases might call for other types of reaction from the administration, such as administrative measures.

This legal framework when applied specifically to self-standing information exchanges means that there might be certain conducts (such as the invitations to collude) which fall under the general application of Article 101 TFEU but not necessarily under Article 23 of Regulation 1/2003. Therefore, they can be prohibited but not be sanctioned.

⁵² Following this view see (Ghezzi & Maggiolino, 2014) *op. cit.* “the EU institutions have always wanted to frame the class of concerted practices as a catch-all device to grasp the species of collusion that do not amount to agreements” and footnote 9 explaining that Decision IV/31.149, 1986 O.J. L 230, § 87, the Commission stated that the notion of concerted practices is a tool “to forestall the possibility of undertakings evading the application of Article [101] by colluding in an anticompetitive manner falling short of a definite agreement”.

⁵³ See Immenga, U. & E.J. Mestmäcker. Wettbewerbsrecht, Band 1. EU, Teil 2. Munich: C.H. Beck, 2012, page 407 “Daher handelt es sich bei Art. 23 Abs. 2 Unterabs. 1 lit. a i. V.m. Art. 81 Abs. 1 EG (jetzt: Art. 101 Abs. 1 AEUV) um ein Tätigkeitsdelikt in der Form eines abstrakten Gefährdungsdelikts.”

C. Our submissions

First, the legal consequences of infringing Article 101 TFEU (general clause) and the one of infringing 101 TFEU as an administrative offence (through the referral of Article 23 Regulation 1/2003) should not be confused.

Indeed, the first one is a general prohibitive clause which just carries by default contractual voidness, whereas the second one sets out an administrative offence, with its corresponding administrative sanction.

There are two different legal consequences attached to the infringement of Article 101 TFEU, the nullity established in Article 101.2 and the administrative sanction established in Article 23 of Regulation 1/2003.

The interplay of these two legal consequences is complex. Article 101.1 of the TFEU is first and foremost a general prohibitive clause – both systematically and historically. However, the drafters of the Treaty foresaw that, as culture of competition developed in Europe, certain infringements of Article 101 TFEU would be so flagrant, so menacing, to competition, that they should be sanctioned, given their harm to competition and also due to the need to deter those conducts to take place again. That is the mandate contained in Article 103 TFEU.

As a result, there are certain conducts which necessarily fall under Article 101 TFEU that deserve a higher punishment than mere civil nullity. The biggest problem that Article 23.2.a) of Regulation 1/2003 poses is that it does not define which conducts should fall under this enhanced interpretation of Article 101 TFEU or which criteria should guide enforcers in deciding which level of punishment deserves a specific conduct which infringes Article 101 TFE.

In other words, any conduct that infringes Article 23.2.a) and therefore, carries a sanction, it is necessarily an infringement of Article 101 TFEU in broad sense and carries, as well, the civil consequences (voidness). However, not

every infringement of Article 101 TFEU should necessarily imply the infringement of Article 23.2.a) of Regulation 1/2003.

Put it differently, not every conduct that menaces competition needs to be sanctioned, only those that clearly do so based on our prior experience. All other which have the object or effect (and we use these terms purposely) of preventing or distortion competition shall be prohibited.

The absence of proper legal (black and white) criteria to distinguish which conducts do actually fall within the realm of Article 23.2.a) of Regulation 1/2003 has forced the European Courts to develop certain rules that allow for a more specific and targeted application of Article 101 TFEU that complies with the principles of legality, legal certainty, harm and culpability.

This finding leads itself to two very interesting consequences:

Monetary fines⁵⁴ - which are set out in Article 23 of the Regulation 1/2003 – are the legal consequence (administrative sanction) imposed by the system as the result of committing an administrative offence and, therefore, should be imposed in accordance with basic tenets developed in continental administrative sanctioning law.⁵⁵ This means that, at the very least, they should be graduated according to the risk posed to competition (harm principle) and the subjective willingness or negligence – of the parties (culpability).⁵⁶

⁵⁴ The Commission has stated that 'the purpose of fines is twofold: to impose a pecuniary sanction on the undertaking for the violation and prevent a repetition of the offence, and to make the prohibition in the Treaty more effective', see the Thirteenth Report on Competition Policy 1983 at para 62. Wils, W. *The optimal enforcement of EC antitrust law: essays in law & economics*. The Hague: Kluwer International, 2002.page 13.

⁵⁵ Huergo Lora, A. *Las Sanciones Administrativas*. Madrid: Iustel, 2007.

⁵⁶ Wils, W. "Optimal Antitrust Fines: Theory and Practice." 29 *World Competition* 2, 2006: "With regard to the first task of clarifying the content of the antitrust prohibitions, fines do not appear to play a significant role" and footnote 35 "Indeed, in those cases where a competition authority would take a decision or bring a prosecution so as to clarify that a certain behaviour, the illegality of which was previously not clear, violates the antitrust prohibitions, the imposition

Article 101 TFEU can and should be applied as a general prohibitive clause without the need to resort to Article 23 of Regulation 1/2003. In other words, given its binding character, Article 101 TFEU could (and should) be used by Competition Authorities as the legal basis under which they could (and should) issue prohibitive decisions.⁵⁷

In other words, not all infringements of Article 101 TFEU should necessarily carry an administrative fine, because Article 101 TFEU does not share the exact same legal nature as Article 23 of Regulation 1/2003. Even though, the legal basis of Article 23 of Regulation 1/2003 is undoubtedly Article 101 TFEU, its scope of application is different, Article 23.2.a) of Regulation 1/2003 tells us that there are certain conducts that infringe Article 101 TFEU so flagrantly that they deserve an administrative fine. This is a very important distinction factor.

of a fine would legally not be possible. In the case of fines imposed by the European Commission for violation of Articles 81 or 82 EC, the 'intent or negligence' required by Article 23(2) of Regulation No 1/2003, as note 6 above, would be lacking; see also Judgment of the EC Court of First Instance of 30 September 2003 in Joined Cases T-191/98 etc. Atlantic Container Line and Others v Commission [2003] ECR II-3275, paragraphs 1611 to 1633."

⁵⁷ In essence, the argument is that Article 101 TFEU contains both a general prohibition and an administrative offense by reason of the inadequate use of the powers conferred by Article 103 TFEU. The general principle only encapsulates a prohibition consequence (see 101.1 and 101.2 TFEU) and, therefore, allows for a more regulatory (*ex ante*) approach, whereas the administrative offence (Article 23 of Regulation 1/2003) applies an *ex post* approach. This division is slightly more clear in US antitrust law given the different (although intermingled) roles of the FTC (as regulator) and the DOJ (as an enforcer) respectively.

See, among others, Kovacic, W., and M. Winerman. "Competition Policy and the Application of Section 5 of the Federal Trade Commission Act." 20 *Minn. J. Int'l L.* 274, 2010: 1001-1022. Cooper, J. "The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act." *George Mason University Law and Economics Research Papers*, 2014 and Hovenkamp, H. "The Federal Trade Commission and The Sherman Act." *Florida Law Review*, Vol. 62, 2010. Similarly, in Switzerland see the ASCOPA case cited in section I.I.2 and discussed in Alfaro, J. "Como se analiza un intercambio de información o qué bien legislan los suizos: Caso suizo de cosmética de lujo." *Blog Derecho Mercantil*, February 23, 2012.

This means that there is much room for the Authorities to maneuver, provided that they are consequent with the legal consequences attached to the behavior under scrutiny.

Secondly, in order to collude, firms might undertake preparatory acts which, depending on the circumstances, shall be sanctioned with lower fines than collusion itself or even with no sanction at all.⁵⁸ In other words, any crime can be committed, but it can also be prepared (designed) or be attempted, why should it be different for competition law infringements?

As we will show, most article 101 TFEU infringements are generally risk offences. By this we mean that the offender is not sanctioned because he has caused a specific harm to specific individuals. Instead, the wrongdoer is sanctioned by reason of the, more or less accurate, danger posed to competition as a collective value deserving protection.⁵⁹

Information exchanges go a step further and advance the scope of protection to practices that might facilitate creating that risk. As such, we firmly believe they should be applied (and punished) restrictively.

Thirdly, these findings, translated into the field of information exchanges, take us to the conclusion that there is room to incorporate an invitation to collude doctrine that might help prevent unilateral disclosures

⁵⁸ In a way, one could say we are following the path opened by (Lianos, Some Reflections on the Question of the Goals of EU Competition Law, 2013) *op. cit.* when he concluded “*defining the contours of what constitutes true unilateral conduct is essential in order to define the concept of antitrust agreement and not the opposite*”.

⁵⁹ Schaub, A. "Working Paper X." *In European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, by C. Ehlermann, & I. Atanasiu. Oxford: Hart Publishing, 2001 page 247 “*It is clear from the very content of the Treaty that effective competition constitutes a public good that must be protected*”. Mr. Schaub was Director General of DG COMP at the time.

of information that, although dangerous, do not fit well in the traditional understanding of concertation.⁶⁰

An invitation to collude concept can relieve authorities (and Courts) from stretching the meaning of concertation beyond any logical limits. Additionally, it is consistent with a broad interpretation of Article 101 TFEU, provided that Competition Authorities only impose injunction orders.⁶¹

⁶⁰ See the very interesting discussion between Advocate General Mayras in *Dyestuffs* and Advocate General Vesterdorf in *Rhône-Poulenc* (*infra* note 449), at II-934 “In a later section, devoted to the adverse effect on competition, Mr Advocate General Mayras further stated (p. 682, right-hand column) : ‘However, there are some academic writers who say, attaching particular importance to objective factors in defining the concept of a concerted practice, that to fall under Article 85 such a practice must actually and concretely have had the effect of altering the conditions of competition. In his opinion on the *Chemiefarma* case, Mr Advocate General Gand seemed to take the same view. He said I have already given you to understand that my opinion is not very far removed from that expressed in those words. Would it be possible to go further and to take into consideration not the result, the actual effect of the practice, but also its potential effect? There can be no doubt that it would seem curious for a concerted practice which has not had any material effect on the competitive situation, despite the intention of the participants and because of circumstances beyond their control, to escape the application of Article 85. I should be tempted to say that in such a case merely to attempt or to initiate execution would be enough to justify the application of Article 85(1).’ **What is interesting about that argument for the purposes of the present cases is that Mr. Advocate General Mayras tries to introduce a doctrine of attempt into the concept of concerted practice as used in Article 85(1).** However, the theory ventured by him has not been supported or commented upon in later judgments of the Court of Justice or by its Advocates General.” In fact, our proposal is not that original. In 1953 when the French Government passed the Decree, whose wording significantly resembles the one used by the draftsmen of the Treaty of Rome, it did include the following provision: “*Est assimilé à la pratique des prix illicites le fait: (...) 3° Par toute personne responsable d’une action concertée de se livrer ou d’inciter à se livrer à une pratique prohibée par l’article 59 bis de la présente ordonnance*” http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19530810&pageDebut=07045&pageFin=&pageCourante=07046

⁶¹ This is not such a drastic proposal if one notices that this happens already with most commitment decisions and that, in fact, during the discussions on the modernization of competition policy, the White Paper expressly acknowledged that the Commission could go beyond sanctioning (and even prohibiting decisions) to issue positive decisions:

“It is true that the Commission would no longer adopt exemption decisions under Article 85(3) as it does now, but it should nevertheless be able to adopt individual decisions that are not prohibition decisions. Where a transaction raises a question that is new, it may be necessary to provide the market with guidance regarding the Commission’s approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest.”

In short, we believe that a clear understanding of Article 101 TFEU might help us deal with those cases which lay on the limits such as self-standing information exchanges, whose difficulties adequately test the consistency of any legal system.⁶²

Or the other way around, there is a need, and a way, to better conceptualize information exchanges and, as result the concept, of concerted practices and, ultimately, Article 101 TFEU.

⁶² (Canaris, 1999) *op. cit.* After all, how is it possible that the same conduct – exchanging information – admits any possible legal characterization under EU Competition law? Or even, similar facts, can lead to different conclusions depending on the Authority reviewing the conduct? How is it possible that one single information disclosure amounts to an infringement by object?

PART ONE - THE LEGAL UNDERPINNINGS ARTICLE

101 TFEU

II. A LITERAL AND SYSTEMATIC INTERPRETATION OF ARTICLE 101 TFEU

In what follows, we study Article 101 TFEU always keeping in mind the two basic angles of any norm: the conduct that is expressly forbidden and the consequences that are attached to its infringement.

This classic distinction between the “*unrecht*” and the “*unrechtsfolge*”⁶³ will invaluablely help us understand two prominent features of Article 101 TFEU: a) that despite being an imperative norm, it is still a general clause, and that b) as such, when it was enacted, its infringement originally carried only a civil consequence and not an administrative monetary fine.

A. Article 101 TFEU: An imperative but general clause

Article 101 TFEU is located within Title VII (common rules on competition, taxation and approximation of laws), Chapter 1 (rules on competition), Section 1 (rules applying to undertakings).

The English version of the Treaty does, therefore, categorize Article 101 TFEU as a “rule”. Similarly, the French version uses the term “*règles*” and the German version refers to it as “*Wettbewerbsregeln*”, which literally translate as rules.

⁶³ Bobbio, N. *Teoría General del Derecho*. Bogotá - Colombia: Temis, 2007 pages 113 and 116 on the legal sanction and the need or not for a sanction in order to have a valid legal norm. Casado, B. "El art. 6.3 CC, ¿punto de partida para el establecimiento de un régimen sancionador en el código civil?" *Estudios sobre invalidez e ineficacia*, 2006, (Larenz, 2009) *op. cit.*, Muñoz Conde, F. *Derecho Penal, Parte General*. Tirant Lo Blanch, 2002, (Muñoz Conde, 2002), for a summary see also De la Torre Díaz, F. *Ética y Deontología Jurídica*. Madrid: Dykinson, 2000 page 200 and seq. among many others.

The Spanish version of the Treaty, however, uses, instead, the more generic term “norm” (“*normas*”), whereas, the Italian version refers generally to the chapter as norms (“*norme*”), and to the section as rules (“*regole*”).

Oddly enough, Article 103 all of these versions refer to Article 101 and 102 as “principles” rather than as “rules”.⁶⁴

This terminology shows, in our opinion, the controversy that surrounded Article 101 TFEU at the time of its drafting. However - leaving historical considerations aside, which will be covered in the next chapter - it is possible to reach a conclusion as to the legal nature of Article 101 that provides an explanation for all these different terms.

The distinction between norms, rules and principles has long been debated both in continental and Anglosaxon law, particularly, with regards to the legal nature of constitutions and constitutional provisions.

As it is well-known, whether the Treaties are constitutional or not is still debated.⁶⁵ Nonetheless, for our purposes it suffices to notice that, even if not purely constitutional in nature, the TFEU and the TEU are closer to constitutional norms, than they are to regular Acts of the Parliament.⁶⁶ This observation is relevant as it guides us towards a breadth of constitutional law literature which has discussed the nature and categories of constitutional provisions.

⁶⁴ 103.1 “The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament”.

⁶⁵ For a summary of the main literature, see Devuyst, Y. “The European Union's Constitutional Order - Between Community Method and Ad Hoc Compromise.” 18 *Berkeley J. Int'l Law* 1, 2000 footnote 4 and De la Sierra, S. “The Constitutional Bases of European Administrative Law.” *What's New in European Administrative Law*, Florence: EUI Working Paper, 2005. 29 - 42.

⁶⁶ According to the European Court of Justice, “the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the Constitutional Charter of the Community based on the rule of law.” Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339, 1365. (Devuyst, 2000)

In the United States, the general view, following Professor Cooley and the US Supreme Court case law, is that constitutional provisions can be divided in two broad categories: self-executing and not self-executing. The definition can be found in United States Supreme Court in *Davis v. Burke*:

*"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."*⁶⁷

Compared to the continental literature on the matter this distinction might be too general, but it helps us understand that there is more than prohibitions and general principles within a constitutional norm. There might be provisions that even though are mandatory in nature, require an act of law to ensure full effectiveness. According to Cooley, in his work on Constitutional Limitations:

*"A constitutional provision does not lose its self-executing quality merely because it provides that the legislature shall by appropriate legislation provide for carrying it into effect; and the mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision does not render such provision ineffective in the absence of such legislation."*⁶⁸

In other words, the fact that a provision might be too general or broad does not preclude its normative character. One can see the parallelism between the above quoted text and the functioning of Article 103 TFEU that foresees future regulations and directives that will establish both the fines for the infringements of Article 101.1 and the exceptions foreseen in Article 101.3 TFEU.

⁶⁷ 179 U.S. 399, 21 S.Ct. 210, 212, 45 L.Ed. 249 (1900)

⁶⁸ Cooley, T. *A treatise on the constitutional limitations which rest upon the legislative power of the state of the American union*, Boston: Little Brown, 1927, 8 ed., Vol. 1, p. 170

The same ideas are present in the continental literature, although they are discussed much more in depth.⁶⁹ Fortunately, they are greatly summarized by García de Enterría⁷⁰ and Nieto⁷¹ in two works following the enactment of the Spanish constitution.

In short, the main idea that prevails among scholars is that there is a distinction between the normative nature of the constitution as such, which is clearly a norm, and the enforceability of each of its precepts separately.

In this regard, Nieto explains, by reference to the German literature, how there are norms which are defined as imperative but incomplete. These norms require an act of law that further completes the norm to make them fully effective. However, this does not mean that, even if not developed further, they cannot be interpreted and applied by a Court.⁷²

This is precisely what happened with Article 101 in *Bosch*,⁷³ when the ECJ ruled that this provision (Article 101) had direct effect, and acknowledged its

⁶⁹ See summarily *supra* in footnote 8.

⁷⁰ García de Enterría, E. *La Constitución como norma y el Tribunal Constitucional*. Madrid: Civitas, 1985, for a summary here http://www.uned.es/dpto-derecho-politico/V._Eduardo_Garcia_de_Enterria_1_%20bis.pdf

⁷¹ Nieto, A. "Peculiaridades Jurídicas de la Norma Constitucional." *RAP* 100-102, 1983.

⁷² (Nieto, *Peculiaridades Jurídicas de la Norma Constitucional*, 1983) *op. cit.* page 393 "*La incompletion de la norma originaria no implica siempre, pues, de forma necesaria un estado de quiescencia. La incompletion es, con frecuencia, un fenómeno deliberado: el autor de la norma no quiere autovincularse pronunciándose definitivamente sobre un tema, al ser consciente de la variabilidad de las circunstancias, y prefiere dejar las puertas abiertas para que una norma futura de rango inferior vaya adaptando el orden jurídico a la realidad política de cada momento.*"

This debate is also very well explained in the Spanish translation of Afonso da Silva, J. *Aplicabilidad de las Normas Constitucionales*. México: Instituto de Investigaciones Jurídicas UNAM, 2003, he defines these norms as norms of limited but direct application. His categorization, by reference to the Italian literature, is as follows: "(I) *normas de eficacia plena y aplicabilidad directa, inmediata e integral*; (II) *normas de eficacia contenida y aplicabilidad directa e inmediata pero posiblemente no integral*; (III) *normas de eficacia limitada.*"

⁷³ 13/61, *De Geus en Uitdenboger v. Bosch and others*, [1962] ECR p. 45

normative and imperative character regardless of the fact the Treaty, already, had acknowledged (in Article 103 TFEU) that it was incomplete provision.⁷⁴

That we are in front of a legal norm which was never merely programmatic;⁷⁵ is evident in the light of Article 85.2 which read very clearly: “Any agreements or decisions prohibited pursuant to this Article shall be automatically void.” However, whether this norm which contained then only a general prohibition clause, was (or could convert into) a proper finable administrative rule⁷⁶ is more debatable.

In the 1980’s Professor Alexy proposed a very useful distinction between rules and principles that moved beyond their normative character.⁷⁷ According to his theory, principles are norms which contain optimization commands, characterized by the fact that they are meant to be satisfied to the greatest extent possible given the legal and factual possibilities. Principles can be satisfied to

⁷⁴ In fact, in *Bosch*, *op. cit.* the German Government argued, and the AG agreed that “A literal interpretation does not shed any light, but this may be obtained from the sense and purpose of Article 85. This provision is based on the principle laid down in Article 3 (f) of the Treaty, whereby the Community must institute a system ensuring that competition in the Common Market is not distorted. Article 85 then is intended to protect the free play of competition. This principle is violated or (and this is sufficient for the purposes of Article 85) endangered when a restriction on competition within the meaning of Article 85 (1) leads to the diversion of trade from its normal and natural routes, since the increase of trade by one route must normally lead to an unfavourable change in respect of another route. For this reason, every factor which affects trade, even though to no great extent, constitutes an obstacle in the sense of Article 85 (1). Further, this provision does not depend on the obstacles actually affecting trade between Member States; it is enough that it ‘may’ do so. Thus, every obstacle to competition which may have effects of any moment at all on the economy of the Member States may affect trade adversely.”

⁷⁵ On this point, it is very interesting to read Von Der Groeben, H. “Policy on Competition in the EEC.” Bulletin of the European Economic Community, 1961: “the cartel provisions of the Treaty were drawn up nor merely as programmes but as direct and immediately applicable law” and the footnotes that ensue this statement.”

⁷⁶ Norberto Bobbio studied in depth the issue on whether a norm could be considered as such if there was no sanction. He reached the conclusion that the more on it moves up the hierarchy of the norms, the more plausible it is that there will be no sanction. (Bobbio, 2007) *op. cit.* For an explanation of his views, Fairén Guillén, V. “La defensa (autodefensa, autocomposición, pacto, contrato, proceso).” *Revista Crítica de Derecho Inmobiliario*, 1990: 467-520. These issues are brilliantly explained in (Nieto, Peculiaridades Jurídicas de la Norma Constitucional, 1983) *op. cit.*

⁷⁷ Alexy, R. *A Theory of Legal Argumentation*. Oxford: Clarendon Press, 1989.

varying degrees and their appropriate degree of satisfaction depends not only on what is factually possible, but also on what is legally possible.⁷⁸ Rules, on the contrary, are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less.⁷⁹

This classification is merely a doctrinal attempt to categorize reality -similar to the American “standards versus rules” distinction -⁸⁰ however, one can see how there is a very sensible conclusion attached to it: imperative norms will normally be located within a broad spectrum, where at one end, they are general and balanced against each other, and at the other, they are specific and exempted only under very concrete circumstances.

Looking at Article 101 TFEU from this perspective, we realize that its location, within this range, is probably closer to the more general norms than to the specific rules.⁸¹

In other words, Article 101 TFEU seems to contain rather a general clause developing a general principle (free competition) than a specific rule.

Two particularities seem to confirm this conclusion. First, that the conduct strictly forbidden is, aside from the five examples provided, very uncertain as it depends on the regulations and directives that will be developed later on under the

⁷⁸ Alexy, R. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2002.

⁷⁹ (Alexy, *A Theory of Constitutional Rights*, 2002) *op. cit.* For a summary see, Alexy, R. "On the Structure of Legal Principles." *Ratio Juris*. Vol. 13 No. 3, 2000: 294-304.

⁸⁰ Kaplow, L. «Rules versus Standards: An Economic Analysis .» 42 *Duke L. J.* 557, 1992: 557 - 629.

⁸¹. On general clauses (Miquel Rodríguez, 1997) *op. cit.*, (Larenz, 2009) *op. cit.*, (Canaris, 1999) *op. cit.* This fits nicely with the opinion of AG Lagrange in *Bosch* (AG Lagrange drafted the TECSC Treaty), above at footnote 74.

In any event, what is undoubtedly clear is that they cannot be classified as a properly defined rule sufficient to satisfy the requirements of legality and, consequently, culpability that any quasi-criminal sanction requires as we will see later on. On these issues, brilliantly, Roxin, C. *Derecho Penal. Parte General*. Tomo I. Madrid: Civitas, 2008 pages 169 a 174, (the German version is titled “*Strafrecht Allgemeiner Teil Band I*”).

mandate of Article 103, and secondly, that rather than exempted, Article 101 TFEU will be balanced against other interests, foreseen but not developed in 101.3 TFEU.⁸² Indeed, as Article 101.3 TFEU shows, it is more an optimization command than a “yes or no” rule.⁸³

B. Article 101 TFEU: the distinction between administrative sanctions and administrative measures

Broadly speaking there are three layers of sanctions that the rule of law (moral considerations aside) can impose for any specific infringement of a binding norm: (i) civil, (ii) administrative and (iii) criminal.

The first layer refers to the consequences within the private relations of parties that have infringed the norm. The consequence will be that any contracts or other actions taken are void or voidable under civil law. This is just the logical consequence of the infringement of an imperative norm. If a norm is part of the

⁸² Article 103 does not introduce an exception between rules, but rather it provides the criteria that should guide the balancing of the collision of principles, (Alexy, *On the Structure of Legal Principles*, 2000) *op cit*.

“The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,*
- any decision or category of decisions by associations of undertakings,*
- any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”*

⁸³ A similar categorization is also present in (Nieto, *Peculiaridades Jurídicas de la Norma Constitucional*, 1983) *op. cit.* when he distinguishes (following Tomás y Valiente and Schenuer) between a) fundamental rights, institutional guarantees, c) mandates to the legislator and d) fundamental principles and State’s goals.

legal system and its compliance its compulsory, other legal acts will not be valid if they contradict this norm, unless there is a legal exception within the system.⁸⁴

The second layer refers to the sanctions or other measures⁸⁵ that can be imposed by the Administration to the infringing parties, for example the obligation to pay a fine or to reestablish the situation existent prior to the infringement (i.e. the demolition of a building constructed in a natural park).

The third layer refers to the sanctions that can be imposed by criminal Courts in accordance with the national penal codes and that, normally, will consist in imprisonment sentences.⁸⁶

As we can see, it seems reasonable to think than the broader and more general the norm the lower the legal consequence attached to it.

Thus, the infringement of general clauses will normally carry a civil “fine” if infringed, whereas specific rules will be the ones that carry administrative or criminal punishments and, as such, will require further guarantees for the addressee before they are applied.

⁸⁴ See Article 6.3 of the Spanish Civil Code for example: “*Los actos contrarios a las normas imperativas y a las prohibitivas son nulos de pleno derecho, salvo que en ellas se establezca un efecto distinto para el caso de contravención.*” (Canaris, 1999) *op. cit.*

⁸⁵ It is important to bear in mind, in this regard, that an administrative measure (for example, to revoke a subsidy for not meeting the requirements) is a very different legal consequence than an administrative sanction (for example, not to be able to apply again for 5 years to any subsidy, for lying in the documents submitted to obtain the revoked subsidy) This distinction is well-known in continental administrative law, among others, Nieto, A. *Derecho Administrativo Sancionador*. Madrid: Tecnos, 2012, (Huergo Lora, 2007) *op. cit.* or De Moor-van Vugt, A. “Administrative Sanctions in EU law.” 5 *Review of European Administrative Law* 1, 2012: 5 to 41, among others, and it has been incorporated into EU law, for example, in Regulation Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

⁸⁶ The distinction between the second and third layer is not as simple as this categorization implies. For a more detailed explanation of the intermingling of these two categories in comparative law, see (Huergo Lora, 2007) *op. cit.* pages 53 and seq.

In other words, there is relationship of direct proportion between the severity of the punishment and the degree of certainty as to the behavior that carries such sanction.⁸⁷

Looking at Article 101 TFEU from this perspective reinforces our thesis that it was not truly an administrative offence (with its corresponding administrative sanction) at the time of the drafting of the Treaty.

To our knowledge there are only three references - within section 1 of chapter 1, title VII - to the possible legal consequences which seem relevant and nicely reflect the three layers just explained, i.e. those contained Article 101.2, Article 105 TFEU and Article 103.

The first reaction, according to **Article 101.2 TFEU**, is that any agreements or decisions prohibited pursuant to Article 101 TFEU shall be automatically void.⁸⁸ This is the perfect example of “civil” type of consequence. Those contracts or legal acts which infringe competition law shall not have any binding effects. This demonstrates the binding and not programmatic nature of the provision.

The second level of reaction is developed in **Article 105 TFEU** which expressly acknowledges that the Commission shall ensure the application of the principles laid down in Articles 101, the Commission shall investigate cases of suspected infringement of these principles and if it finds that there has been an infringement, it shall propose the appropriate measures to bring it to an end.

⁸⁷ (Huergo Lora, 2007) *op. cit.*. Demanding this principle in the ECJ case law, see Schwarze, J., and R. Bechtold. *Deficiencies in European Community Law, Critical Analysis of the Current Practice and Proposals for Change*. Brussels: Gleiss Lutz, 2008: “a correlation must be recognised to the effect that the less protection provided by administrative proceedings to the parties concerned in terms of the rule of law, the more extensive the judicial remedy must be”. Discussing this correlation in German criminal law, also (Roxin, *Derecho Penal. Parte General*. Tomo I, 2008) page 171.

⁸⁸ This statement might have seen unnecessary in any system guided under the rule of law as it seems a logical consequence of any coherent system. Nonetheless, it might have been justified under historical reasons to highlight the binding (or normative character of the norm), as we will see later on.

This is an example of an administrative measure, this means that the powers of the authority are limited to bring the situation to an end, to reconstitute the legality but there is no possibility to punish said behavior.

The third level of reaction is merely announced in **Article 103** according to which, the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. These regulations or directives shall be designed in particular to ensure compliance with the prohibitions laid down in Article 101(1) by making provision for fines and periodic penalty payments.

This means that at the time of the drafting of the Treaty, the infringement of Article 101 TFEU did not carry an administrative fine. The development of an administrative sanctioning regime would be the duty of the Council, the Commission and the Parliament through detailed regulations or directives to such purpose. In other words, infringing Article 101 TFEU was not truly an administrative offence.

C. Article 23.2.a) of Regulation 1/2003: a forwarding provision

As it is well-known, Regulation 1/2003 is the current EU legislator's response to the mandate contained in Article 103 TFEU. The Regulation deserves much credit as it allowed for a considerably homogenous competition law regime to develop all around the EU. However, its merits lay more on the procedural side of the application of Article 101 TFEU, than on its substantive part.⁸⁹ In fact,

⁸⁹ (Schwarze & Bechtold, 2008) *op. cit.* "There are considerable doubts about the existence of such a "clear and unambiguous legal basis"34, because the nature of Art. 23 of Reg. 1/2003 as a substantive rule is insufficient with regard to the imposition of fines. For example, the provision merely requires an intentional or negligent infringement by an undertaking or association of undertakings of the essential competition provisions of Art. 81 or 82 EC, which are broadly worded giving them a general-clause-like character (Art. 23 (2) of Reg. 1/2003)."

going through the Regulation on realizes that the only reference to the substance of Article 101 TFEU is contained in Article 23.2.a) which states:

“The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: (a) they infringe Article 81 or Article 82 of the Treaty...”

Regulation 1/2003 is a good example of delegated legislation. The drafters delegated in the Parliament, the Council and the Commission the power to further develop into proper rules the principles contained in Article 101 TFEU.

As it is well known there is breath of literature, particularly in criminal law, which has studied the phenomenon of the delegated legislation, by studying this literature we can realize that problem of Regulation 1/2003 is not exactly one of ultra-vires expansion of the reach of Article 101 TFEU or one of legitimacy, as it is normally the case in said literature.⁹⁰

The problematic of Article 101 TFEU is the opposite: it does not elaborate at all the principle. In fact, under criminal law theory, we could define Article 23 of Regulation 1/2003 as “*reverse blank norm*”⁹¹ or if we prefer a more “administrative” terminology an unfinished referral (“*remisión incompleta*”).

Why? Because all that the Regulation does - in order for us to better understand the administrative offence - is to send us back to Article 101 TFEU. In

⁹⁰ (Muñoz Conde, 2002) *op. cit.* (Huerco Lora, 2007) *op. cit.*

⁹¹ Mir Puig, S. *Derecho Penal (Parte General)*. Barcelona: Reppertor, 2011, this doctrine is much more controversial and the general view is that they should be considered unconstitutional. (Immenga & Mestmäcker, 2012) *op. cit.* page 405 define it as a blank norm “*Um den Inhalt der Bußgeldtatbestände zu bestimmen, bedarf es also des Zusammenlesens von verweisendem und ausfüllendem Gesetz. Erst auf diesem Weg kann der voll-ständige Tatbestand gebildet werden. Da die Bußgeldvorschrift des. Art. 23 Abs. 2 Unterabs. 1 lit. A auf eine Norm verweist, die durch eine andere als die die Bußgeldandrohung erlassende Instanz gesetz worden ist, handelt es sich hierbei um ein echtes Blankettgesetz. Die durch Art. 23 Abs. 2 Unterabs. 1 lit. a in Bezug genommenen außerstrafrechtlichen Normen der Art. 81 und 82 EG erlagen durch das Zusammenslesen nicht die Rechtsqualität einer Bußgeldnorm.*”

other words, instead of telling us what rules are embedded in Article 101 TFEU, all that Regulation 1/2003 does is to tell us that there are rules within that principle.

As a result of Article 23.2.a) of Regulation 1/2003 and the requirement imposed by the European Charter of Fundamental Rights, the EU Courts are now forced to extract from the general principle contained in Article 101 TFEU, those rules that allow for the imposition of administrative sanctions without infringing the basic principles of legality,⁹² legal certainty, culpability or harm.⁹³

D. Article 101 TFEU under the light of Article 2.2 of Regulation 2988/95: an administrative irregularity not an administrative sanction

Outside of the Treaty itself, there are other norms which prove our point. Regulation 2988/95, for example, provides an additional justification for our conceptualization of Article 101 TFEU.

Regulation 2988/95 of 18 December 1995 on the protection of the European Communities financial interests was adopted to set out general rules “*relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law*”.

According to the norm, “Irregularity” means any infringement of a provision of Community law resulting from an act or omission by an economic operator,

⁹² This could be a valid alternative in Anglo-saxon countries where the common law is accustomed to develop such rules through precedents, however, it is less useful in continental countries where judges tend to recur more often to the black letter law and only use precedent as guidance without the critical and systematic analysis which is mandatory under the common law.

⁹³ This point will be further developed in chapter VI.

which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them.⁹⁴

Article 2 sets out the general rules for any administrative irregularity. Thus, even though not strictly applicable to competition law, it does provide a very interesting theoretical framework as to the minimum requirements imposed by EU law to punish such irregularities.

According to Article 2:

“1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

4. Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.”

⁹⁴ See Article 1 of Regulation 2988/95.

Under a literal interpretation, it seems debatable whether Article 2.2 of Regulation 2988/95 demands that the EU legislator sets out the offence (the irregularity) and consequence (the measure or sanction) within the same norm, as some authors read,⁹⁵ or whether it just demands the sanction to be properly developed in a black letter norm, whereas the irregularity can be derived from other parts of the “Community acquis”.

Even though the first possibility seems the most logical one to comply with the principles of legality and legal certainty,⁹⁶ Article 2 undoubtedly demonstrates that the infringement of Article 101 TFEU prior to Regulation 17/62 (i.e. prior to any monetary sanction) was, at the most, under the EU law an “administrative irregularity” with no specific (and even less graduated or proportionate) administrative sanction attached to it.

In other words, even though Article 103 TFEU referred to the possibility of future sanctions, because there was not a specific administrative penalty attached to the infringement of Article 101 TFEU, one can ultimately conclude that Article 101 TFEU was not envisioned as a specific administrative rule but rather as a general clause with the legal consequences that this entails.

E. A comparative law check: the U.S. Distinction between section 1 of the Sherman act and section 5 of the FTC act

Ultimately, we can obtain further support for our theory, from a policy approach, from the analysis of the U.S. antitrust laws. As opposed to the

⁹⁵ (Huergo Lora, 2007) *op. cit.* at page 121 “*El Reglamento 2988/1995 no es un código de infracciones y sanciones administrativas, sino una <<parte general>> de éstas y (por separado) de otras medidas no sancionadoras que también sirven como reacción frente a comportamientos ilegales. La función de tipificar las infracciones y sanciones corresponde a otras normas comunitarias, de carácter sectorial o especial (2.2)...*”

⁹⁶ Similarly, (De Moor-van Vugt, 2012) *op. cit.* “*This text might suggest that the principle of legality only applies to the penalties. In the Kinicke case, however, the Court emphasized that ‘penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis’.* Case 117/83, [1984] ECR 3291

simplicity of EU competition law, in the United States, Antitrust Agencies apply three different Acts: (i) the Sherman Act of 1890, (ii) the FTC Act and (iii) the Clayton Act, these last two of 1914, in the fight against collusion.

Of these three norms the Federal Trade Commission Act which bans "*unfair methods of competition*" and "*unfair or deceptive acts or practices*" remains probably the less known in Europe.

The exact meaning of these words is highly debated and it is breadth has fluctuated over the years depending on the majorities existing at the Supreme Court. Nonetheless, one thing is certain: according to the Supreme Court all violations of the Sherman Act also violate the FTC Act.⁹⁷

Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act, such as the invitations to collude.⁹⁸

This provides the FTC with a very wide toolkit to prosecute cases that under the Sherman act would be, at the most, considered as borderline. Only the FTC brings cases under the FTC Act (there is no room for civil actions) and it cannot impose monetary fines (unless it is for infringing a prohibition decision).⁹⁹

⁹⁷ See Peritz, R. "Unfair Methods of Competition Under FTC 5: Beyond the Sherman Act and an Ex post Model of Enforcement." 56 *Antitrust Bulletin* 825, 2011. and (Kovacic & Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 2010) *op. cit.*

⁹⁸ The first cases date back to the early 80's with the blunt proposal of American Airlines to his counterpart at Braniff to "*raise you goddam fares twenty percent [and] I'll raise mine the next morning*" [United States v. American Airlines, 734 F.2d 1114, 1116 (5th Circ. 1984)] although the concept consolidated in the early 90's with *Quality Trailer Products* seen above. Fullerton, L. "FTC Challenges to Invitations to Collude." 25 *Antitrust* 2, 2011: 30-35.

⁹⁹ See the summary provided by the FTC, available at <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>

Section 5 claims are, therefore, brought only by the FTC before an expert administrative tribunal (an Administrative Law Judge whose decision can be later reviewed by the Commission and, subsequently by Federal Courts) which has power to impose prospective equitable relief (not monetary remedies or criminal sanctions), whose decisions interpreting Section 5 have no collateral effects in private litigation (there are no treble damages and only the FTC can start such an action) and whose work is reviewed by appellate courts under a more deferential (Chevron)¹⁰⁰ standard¹⁰¹ than the DoJ.

Thus, in all collusion cases, the Agency has the alternative to choose one legal basis or other. In fact, it is generally understood that Congress intended Section 5 to be a mechanism for upgrading the U.S. system of competition law by permitting the FTC to reach behavior not necessarily proscribed by the other U.S. competition statutes, including the 1890 Sherman Act and the Clayton Act.¹⁰²

This distinction between a criminal norm (the Sherman Act) and the purely administrative offence (the FTC Act) resembles the differentiation exposed above between Article 101 TFEU as a principle and as a rule.

The norm which allows the broadest application (FTC Act) empowers the Authority only to prohibit the behavior, while the norm (the Sherman Act) that imposes both monetary and criminal sanctions requires a much more strict

¹⁰⁰ This issue of whether the Chevron standard applies as to other administrative agencies is debated, see (Cooper, 2014) *op. cit.*

¹⁰¹ (Kovacic & Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 2010) *op. cit.*, see also the speech by Commissioner Wright, J. *What's Your Agenda*. Washington: ABA Spring Meetings, 2013.

¹⁰² (Kovacic & Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 2010) *op. cit.* As it is well-known that Congress intended Section 5 to be a mechanism for upgrading the U.S. system of competition law by permitting the FTC to reach behavior not necessarily proscribed by the other U.S. competition statutes, including the 1890 Sherman Act and the Clayton Act.

application, through its subsidiary rules, of the principles of foreseeability, culpability and harm.¹⁰³

This distinction supports, in our opinion, the feasibility - at least theoretically - between the application of competition law at two levels or two speeds: one more broad and general, perfectly suitable for competition policy, another one more specific and strict, perfect for enforcement and deterrence.¹⁰⁴

¹⁰³ These issues are subtly mentioned in Rybníček, J., and J. Wright. "Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines." 21 *Geo. Mason L. Rev.* 5, 2014: 1287 -1315, when they explain the common law evolution of the Sherman Act. Very interestingly, as well, Bork, R. *The Antitrust Paradox*. New York: Free Press, 1993. page 20 when talking about the Sherman Act emphasizes the need to create subsidiary rules "*The statute was intended to strike at cartels, horizontal mergers of monopolistic proportions, and predatory business tactics. Wide discretion was delegated to the courts to frame subsidiary rules*", also ABA. *Monograph n°23, The Rule of Reason*. Chicago: ABA, 1999, pages 21 to 33.

¹⁰⁴ In fact, we find surprisingly much support for our thesis in the conclusions of Bork's famous Antitrust Paradox, (Bork, 1993) *op. cit.* pages 408 to 418. Even though Bork criticize the lack of a clear understanding of the economic theory, some assertions clearly point out the elusive nature of the Sherman act and the need for precise rules to be drafted in landmark cases by the adequate parties "*The central institution is making antitrust law has been the Supreme Court. That is true because the antitrust laws are so open-textured, leave so much to be filled in by the judiciary, that the Court plays in antitrust almost as unconstrained a role as it does in constitutional law*" (...) "*Yet the performance of the courts would have been far better in antitrust, as in other fields of law, had they received the support they were entitled to expect from the other participants in the policymaking enterprise*".

III. A HISTORICAL INTERPRETATION OF ARTICLE 101 TFEU

A review of the history of Article 101 TFEU does, in fact, confirm our theoretical conclusions as to the legal nature of Article 101 TFEU as a general clause which required specific rules to impose administrative sanctions.

A. The drafting of Article 101 TFEU (85 TEC): a general clause aimed at dismantling “public cartels” in Europe

In 1951, West Germany, France, Italy and the Benelux countries ratified the Treaty Establishing the Coal and Steel Community (“TECSC”). One of the basic aims of the international agreement was to create a system of undistorted competition in the coal and steel market. Article 65, which contained the seed for our Article 101 TFEU today¹⁰⁵, read:

*“All agreements between undertakings, decisions by associations of undertakings and concerted practices tending **directly or indirectly** to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending: (...)”*¹⁰⁶

In 1957, the same countries that formed part of the Coal and Steel Community ratified the Treaty of Rome, the starting point of the European Union. The Treaty mirrored the main concepts of the TECSC.¹⁰⁷ Article 85 of the Treaty of Rome read:

*“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have **as their object or effect** the prevention, restriction or*

¹⁰⁵ Chirita, A. "A Legal Historical Review of the EU Competition Rules." *International & Comparative Law Quarterly*, 2013, also Italianer, A. "The Object of Effects." *CRA Conference*. Brussels, 2014 saying that the object and effect distinction was in “embryonic form” in the TESCOs.

¹⁰⁶ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>

¹⁰⁷ (Chirita, 2013) *op. cit.*

distortion of competition within the common market, and in particular those which: (...)”

The view among the scholars that have studied the historical origins of Article 101 TFEU is that Article 85, at the time, whilst influenced by Article 65 TECSC went considerably beyond it in both width of application and in the specification.¹⁰⁸

Nonetheless, the distinction between “*tending directly or indirectly to prevent*”¹⁰⁹ to “*which have as their object or effect the prevention*”¹¹⁰ has not received significant attention, despite the fact that these few words have been one of the biggest headaches for competition law experts since then.¹¹¹

Even though much has been written about the distinction between infringements by object and effect,¹¹² the number of studies that have sought to understand the norm through a historical analysis is still quite limited.¹¹³

Indeed, the academic literature has focused normally on: (a) the interpretation given to these terms by the European Courts, (b) their parallelism (or not) with the “per se” and “rule of reason” distinction in the United States, (c) the burden of proof and (d)

¹⁰⁸ Goyder, D.G. *EC Competition Law*. Oxford University Press, 1993, page 31.

¹⁰⁹ Article 65 TECSC.

¹¹⁰ Article 101 TFEU.

¹¹¹ See (Italianer, The Object of Effects, 2014) *op. cit.*

¹¹² See the opinions of the AG Cruz in case C-32/11, *Allianz Hungária Biztosító Zrt. and others v. Gazdasági Versenyhivatal* and of AG Wahl in C-67/13 P, *Groupement des cartes bancaires (CB) v. Commission*, for a summary of the main issues of the distinction.

¹¹³ See (Faull & Nikpay, 2014) *op. cit.*, Gerber, D. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. Oxford University Press, 2001 and Patel, K. and H. Schweitzer. *The Historical Foundations of EU Competition Law*. Oxford University Press, 2012.

As explained by AG Vesterdorf in Rhône-Poulenc, T-1/89, joined opinion delivered on 10 July 1991, ECR-869, at 927 “*The interpretation of the Treaties on the basis of the travaux préparatoires is a notoriously difficult area in Community law, one reason for this being that a large number of the preparatory documents have not been published. In the area of competition law, the difficulties are illustrated, for example, by Ellis's examination of the known, more or less official, preparatory documents relating to Article 85. It is probably also indicative that the applicants have not pointed to any specific, written elements in the genesis of Article 85 in support of their view.*”

the possibilities of rebuttal under Article 101.3 TFEU.¹¹⁴ These are important aspects, no doubt about it. However, if one traces the problem back to its origins, he realizes that it might have been looked under the wrong light.

A simple explanation¹¹⁵ for the distinction between “directly or indirectly” and “object or effect” could be that they are just not that different. In fact, one could reasonably argue that these are just linguistic mechanisms in order to capture all possible behavior that can have an impact in competition. Either because the impact was direct, the conduct has as its objective (its goal) to infringe competition, or because the impact was indirect, despite the intention of the parties, the conduct had an effect in competition. In other words, a device in order to capture all possible fact patterns with an impact (threat) on the public interest protected by the rule of law: competition. This interpretation would match nicely with the general understanding of a principle under Alexy’s definition as explained above.¹¹⁶

As over simplistic as this might sound - and despite the ECJ case law on the contrary - we firmly believe (and sincerely apologize for our boldness) that this was the initial intention of the draftsmen of the Treaty of Rome.¹¹⁷ In our opinion, the lack of a proper development of Article 101 TFEU through a Regulation with its corresponding rules and sanctions has forced the ECJ to develop a theory on competition law from the

¹¹⁴ (Bellamy & Child, 2008) *op. cit.*, (Wish, Competition Law, 2012) *op. cit.*, (Faull & Nikpay, 2014) *op. cit.*

¹¹⁵ We submit that it is “simple” if we obliterate the case law of the ECJ for a moment for the sake of the discussion.

¹¹⁶ (Alexy, On the Structure of Legal Principles, 2000), *op. cit.* Not only so, but it correlates quite nicely with the preliminary draft of the Sherman Act sent to Congress “*all arrangements, contracts, agreement, trusts or combinations between persons made with a view, or which tend to prevent full and free competition*”, (ABA, 1999) *op. cit.*

¹¹⁷ AG Vesterdorf in Rhône-Poulenc, T-1/89, joined opinion delivered on 10 July 1991, ECR-869, at 927: “*It is certainly not improbable that the applicants may well be right in their observations on the historical background, but the significance which can be attached to them is hardly decisive. When one considers the wording of the provision, which is plainly intended to embrace all anticompetitive activity incompatible with the common market, it cannot be presumed without very solid evidence that the authors of the Treaty wished to exclude from the scope of the provision a whole category of questionable business initiatives. The Court of Justice has made no such assumption in the cases in which it has had occasion to address this matter, as is clear from the judgments cited below. Nor do I see any decisive criteria for interpretation which would compel the Court to limit the scope of Article 85 in that way.*”

limited words of Article 101 TFEU which is precisely the seed of the obtuse meaning of “object or effect” nowadays.

As it is well-known nowadays, during the discussions over the draft of Article 85 TEC, there was a clash between two opposing views on the role that competition norms should play in the market. On the one hand, one party defended its binding and compulsory character (the Ordoliberal German School) while, on the other, others defended a more flexible approach as a guiding principle, rather than a prohibiting provision.¹¹⁸

The traditional view is that German Ordoliberal School prevailed.¹¹⁹ However, recent studies have shown that, even after Article 85 TEC was drafted, there were serious discussions as to its exact scope of application and the influence of the Ordoliberal School, even though important, might have been overemphasized.¹²⁰

An important fact that has to be born in mind in this regard is that the German Law on Restraints of Competition was being debated at the same time as the Treaty of Rome was being drafted. This should caution against making an interpretation of the wording of Article 85 TEC using concepts that were developed by the German Ordoliberal School after the German Law entered into force.¹²¹

Keeping this in mind, it is very interesting to acknowledge the similarities between Article 85 TEC and the French Price Control Ordinance of 1953. Indeed, Article 59 bis of the Price Control Ordinance of 1945, introduced through the Decree of

¹¹⁸ (Chirita, 2013) *op. cit.*, Alm, L. *What is the point of European Competition Law?* Lund: University of Lund, 2007 and (Patel & Schweitzer, 2012) *op. cit.*

¹¹⁹ (Faull & Nikpay, 2014). For a good summary of the evolution of EU Competition law, although following in some general common places see Weibrecht, A. "From Freiburg to Chicago - 50 years of Competition Law Enforcement." *E.C.L.R.* 2, 2008.

¹²⁰ See (Patel & Schweitzer, 2012) *op. cit.* Buxbaum, H. "German Legal Culture and the Globalization of Competition Law: A Historical Perspective." *Faculty Publications, Indiana University, Paper 327*, 2005, Schwartz, I. "Antitrust Legislation and Policy in Germany - A Comparative Study." 105 *University of Pennsylvania Law Review* 617, 1957 and "The Drafting of Article 81 EC" available at <http://www.european-law.it/upload/1271921852.pdf>

¹²¹ (Patel & Schweitzer, 2012) *op. cit.*

9 August 1953, which regulated the ‘*délit de coalition*’, expressly prohibited all agreements the object or effect of which was to distort competition¹²² as follows:

*“Sont prohibées, sous réserve des dispositions de l’article 59 ter, toutes les actions concertées, conventions, ententes expresses ou tacites, ou coalitions sous quelque forme et pour quelque cause que ce soit, **allant pour objet ou pouvant avoir pour effet** d’entraver le plein exercice de la concurrence en faisant obstacle à l’abaissement des prix de revient ou de vente ou en favorisant une hausse artificielle des prix.”*¹²³

There is however, an older precedent, law n°56 of 1947 passed by the American Forces¹²⁴ in Occupied Germany¹²⁵ even closer, prohibiting:

*“Cartels, combines, syndicates, trusts, associations or any other form of understanding or concerted undertaking between persons, which have the **purpose or effect** of restraining, or of fostering monopolistic control of domestic or international trade or other economic activity, or of restricting access to domestic or international markets.”*¹²⁶

This norm is, as far as we know, the oldest precedent of the wording later used in Article 85 TEC.¹²⁷ If we look at Article 85 TEC, under this light, our suggestion that it was a catch-all prohibition gains strength.¹²⁸

¹²² Brilliantly explained in Riesenfeld, S. "The Legal Protection of Competition in France." 48 *California Law Review* 574, 1960.

¹²³ Notice that the French norms were focused on final prices, therefore, clearly on consumer welfare. This issue was brought indirectly in the T-Mobile case, where it was argued by the parties that only information exchanges with a direct impact on final prices could amount to infringements by object.

¹²⁴ (Schwartz, 1957) *op. cit.*

¹²⁵ Followed by similar norms by the forces in other occupied zones of Germany, see (Patel & Schweitzer, 2012) *op. cit.* page 97.

¹²⁶ Brand, L. *Antitrust auf deutsch: der Einfluss der amerikanischen Aliierten auf das Gesetz gegen Wettbewerbsbeschränkungen (GWB) nach 1945*. Tübingen: Mohr Siebeck, 2004. (Brand, 2004) available at http://books.google.es/books/about/Antitrust_auf_deutsch.html?id=UBKl_UWHeEcC&redir_esc=y

¹²⁷ By this we mean with the same words, as explained above, the first draft of the Sherman Act, seems to be also interestingly close “*all arrangements, contracts, agreement, trusts or combinations between persons **made with a view, or which tend to prevent full and free competition***”, (ABA, 1999) *op. cit.*

Jean Monnet attributed in his memories the authorship of Articles 65 and 66 of the TESCOs (the closest precedent of Article 85 TEC) to the American professor and civil servant Robert Bowie.¹²⁹ This seems to be also the general view among the limited literature that has dealt with the historical underpinnings of Article 101 TFEU.¹³⁰

Today, it is impossible to know what had Professor Bowie in mind when he wrote the seed of Article 101 TFEU and, all we have is his recollection of what was happening at the time.¹³¹ Moreover, there seems to be an agreement that the norm was adjusted to European standards by Maurice Lagrange, a member of the French Conseil d'État and later on, advocate general of the ECJ.¹³²

Despite these limitations, the documents that have survived to our days,¹³³ demonstrate that the main concern at the drafting of Article 65 TEC was to ensure a smooth transition from the breaking up of the German industry (particularly through

¹²⁸ Scherer, F. *Competition Policies for an Integrated World Economy*. Washington: The Brookings Institution, 1994 page 29, links the policy on cartels to the Postdam Agreement and the agreements between Churchill and Roosevelt agreement to convert Germany into a country “principally agricultural and pastoral”. (Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus, 2001) *op. cit.* nuances it by pointing out that this provisions came into force once the “Morgenthau” Plan was abandoned.

¹²⁹ See, the Spanish translation of his « memoirs », Monnet, J. *Memorias*. Madrid : Encuentro, 2010, page 395, talking about McCloy's companion, profesor Robert Bowie “*Tenía a su lado a un joven profesor de Harvard, Robert Bowie, considerado como el mejor especialista en la legislación anti-trust que los Estados Unidos aplicaban con el mismo rigor que si se tratara de principios morales*” and 396 “*Finalmente, el 14 de marzo de 1951, el plan aliado de descartelización obtuvo el acuerdo de Adenauer, y de inmediato Hallstein aceptó los dos artículos pendientes. Éstos habían sido redactados por Bowie con meticulosa precisión.*”

¹³⁰ See Wells, W. *Antitrust and the Formation of Postwar World*. New York: Columbia University Press, 2002. Ulrich, H. *The Evolution of European Competition Law: Whose Regulation, Which Competition?* Cheltenham: Edward Elgar, 2006, page 26 and McGowan, L. *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy*. Cheltenham: Edward Elgar, 2010 page 82 and Akman, P. *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*. Oxford: Hart Publishing, 2012 pages 70 and 71.

¹³¹ Duchène, F. *Interview with Robert Bowie*. Florence: EUI, 1987 available at http://archives.eui.eu/en/oral_history/INT490_page21. “*It was his initiative, not mine, to say to me, would you draw us up what you think we should have in the way of anti-trust law? So I tried*”.

¹³² For a summary of the literature on this issue see (Chirita, 2013) *op. cit.*

¹³³ The memoirs of Jean Monnet and the interviews with relevant figures of time, available at the historical archives of the EUI in Florence <http://www.eui.eu/Research/HistoricalArchivesOfEUI/Index.aspx>

Law n°27)¹³⁴ towards a union were Germany would not feel disfavored vis-à-vis the other European countries, while ensuring that the cartels that sustained the warfare machinery could never gain the same power again.¹³⁵

Thus, the parallels with the norm of 1947 just explained are considerable. Just glancing at this historical precedent, and the recollection of these prominent figures, one realizes soon that the very first purpose was very clear: to “*prevent Germany from endangering the safety of her neighbors and again constituting a threat to international peace*”.¹³⁶

The goal, therefore, was to ensure that all “public” cartels (trusts in American terminology) were dismantled.¹³⁷ The norm was essentially prohibitive and technically,

¹³⁴ Law 27 on the reorganisation of the German coal and steel industries (16 May 1950), available at http://www.cvce.eu/en/obj/law_no_27_on_the_reorganisation_of_the_german_coal_and_steel_industries_16_may_1950-en-6148d81c-88f9-4afd-9f95-d2b626b9ed0b.html

¹³⁵ (Duchène, 1987) *op. cit.* available at http://archives.eui.eu/en/oral_history/INT490 “*I think the United States felt really, over a period of several years earlier than this, that a policy towards Germany which had any of the elements of memories of Versailles, was bad. Anything which essentially perpetuated a picture of a Germany which was being held down by the others, and being discriminated against was not a good viable solution for the indefinite future. It had in it all the seeds of trouble and tension that developed after Versailles. Therefore, the Schuman Plan was greeted with great satisfaction on the American side, because it was felt that this at least purported to put Germany and France on a basis of reconciliation and cooperation. and of accepting whatever constraints there would be as mutual constraints, and therefore ones which could endure without necessarily creating frictions and hostility, which were almost inherent in any kind of unilateral imposition of restrictions which were represented by Law 27. The idea that Law 27 would be carried out enough to put German industry essentially on a similar footing to that in France and the other members of the Coal and Steel Community was thought to be acceptable, defensible, but it was certainly welcomed that this would be superseded by a mutual system of restraint thereafter.*”

¹³⁶ Brilliantly explained in (Schwartz, 1957) *op. cit.*

¹³⁷ In this regard, it is fascinating to read the letter written by F.D. Roosevelt to the Secretary of State in 1944: “*Dear Mr. Secretary: During the past half century the United States has developed a tradition in opposition to private monopolies. The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the Constitution. By protecting the consumer against monopoly these statutes guarantee him the benefits of competition. This policy goes hand in glove with the liberal principles of international trade for which you have stood through many years of public service. The trade agreement program has as its objective the elimination of barriers to the free flow of trade in international commerce; the anti-trust statutes aim at the elimination of monopolistic restraints of trade in interstate and foreign commerce. Unfortunately, a number of foreign countries, particularly in continental Europe, do not possess such a tradition against cartels. On the contrary, cartels have received encouragement from some of these Governments. Especially is this true with respect to Germany. Moreover, cartels were utilized by the Nazis as governmental instrumentalities to achieve political ends. The history of the use of the I. G. Farben trust by the Nazis reads like a detective story. The defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic warfare. But more than the elimination of the political activities of German cartels will be required.*”

under Administrative law, there was no administrative monetary sanction¹³⁸ since the consequence was just an administrative measure:¹³⁹ imposing the obligation to bring the situation back into legality, through the dismantling of the German trusts existing in specific industries.¹⁴⁰

It was completely sensible that no monetary penalties were attached to it, not only not to make Germany feel disfavored, but also because most European countries were cartelized (and had been so under the government's auspices). In other words, the fight against cartels at the time was not one against secret cartels as it is today; it was the search for a different economic regime.

Put it differently, the object or effect distinction within Article 101 TFEU was not inspired in the procedural and judicial American distinction between per se and rule of reason, it had a very different purpose: to make the prohibitive principle as broad as possible with regards to its factual application.¹⁴¹

If we link these findings to the state of Article 85 TEC at the time of signature of the Treaty of Rome, we realize that Article 85 TEC was conceived initially purely as a

Cartel practices which restrict the free flow of goods in foreign commerce will have to be Curbed. *With international trade involved this end can be achieved only through collaborative action by the United Nations.*” Available at <http://www.presidency.ucsb.edu/ws/?pid=16554> and cited, among others, in (Freyer, 2006) page 53

¹³⁸ (Nieto, Derecho Administrativo Sancionador, 2012) *op. cit.* and Rebollo, M. *Derecho Administrativo Sancionador*. Valladolid: Lex Nova, 2010. This should not surprise us, afterall, since Maurice Lagrange, the member of the Conseil d'État, which translated the texts of the TECSC, was an expert in administrative litigation according to Jean Monnet, see (Monnet, 2010) at 395 “*Tenía el tratado encima de mi mesa desde hacía tres meses: cien artículos redactados, pero dos de ellos afectados por una reserve que lo bloqueaba todo. La redacción era obra básicamente de Uri y de un gran jurista, Maurice Lagrange. Una vez más nos acompañó la suerte (...) la designación recayó en un austero y modesto abogado de lo contencioso...*”

¹³⁹ (De Moor-van Vugt, 2012) *op. cit.* Not all infringements carry out a monetary fine or sanction, in fact, many times the law just requires a measure that re-establishes the legality without any further obligation on the side of the wrongdoer.

¹⁴⁰ (Goyder, 1993) *op. cit.* page 17: “*The original policy objectives behind these measures had been largely negative (to prevent Germany from again become a threat to peace) and restrictive, the ‘decartelization’ of the existing structures of industry in the various sectors (coal, iron and steel, chemicals, plastics, heavy engineering, banking, etc.)*”.

¹⁴¹ For a very good explanation of the purposes behind Roosevelt interest's in setting up a law against cartels, see Haley, J. *Antitrust in Germany and Japan, The First Fifty Years, 1947-1998*. Washington: University of Washington Press, 2001.

prohibitive norm (directly applicable)¹⁴² incorporating the lowest sanction possible: nullity according to civil law and measures to reestablish the legality.¹⁴³

This is further supported by Spaak report, the document preceding the Treaty of Rome, that clearly set out that the Treaty was to contain the general principles, not the administrative rules:

***“Les principes inscrits dans le traité** doivent être assez précis pour permettre à la Commission européenne de prendre des règlements généraux d’exécution, qui seront soumis au vote de l’Assemblée, et qui auront pour objet d’élaborer les règles détaillées concernant la discrimination, d’organiser un contrôle des opérations de concentration, et de mettre en pratique une interdiction des ententes qui auraient pour effet un répartition ou une exploitation des marchés, une limitation de la production ou du progrès technique.”*¹⁴⁴

In fact, even though, the draftsmen of the Treaty foresaw the possibility to impose administrative sanctions (monetary fines) as a coercive method in order to ensure compliance with Article 85 TEC, these were not expressly included given the impossibility to reach a consensus at the time.¹⁴⁵

¹⁴² Under this historical explanation, the opinion of Advocate Lagrange in Bosch (where he made a clear defense of the direct application of Article 85 at the time) becomes even more interesting.

¹⁴³ For a summary of the evolution see also Deringer, A. "Las Régles de la Concurrence au Seind de la C.E.E." 7 *Revue du Marché Commun* 560, 1965. An Spanish translation is available at http://www10.iadb.org/intal/intalcdi/Derecho_Integracion/documentos/002-Estudios_05.pdf

¹⁴⁴ Spaak Report, "Report of the Heads of Delegation of the Governmental Committee set up by the Messina Conference and addressed to the Ministers of Foreign Affairs." 1956.

¹⁴⁵ (Patel & Schweitzer, 2012) *op. cit.* That is the reason why Article 87 TEC set out then: “1. Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly [European Parliament], adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly [European Parliament]. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments.”

The conclusion that should be inferred from the above, in our opinion, is that the wording of Article 101 TFEU was set out only to determine a general prohibition - as broad as possible - which carried a civil sanction: nullity. As a result, the terms object and effect should be read within this context and not according to the very confusing case law of the European Courts.¹⁴⁶

In other words, the draftsmen envisioned that the finable administrative rules would be drafted separately and, carefully, into a different legal norm. Unfortunately, as we will show in the next section, the drafting of these administrative sanctions was anything but perfect.

B. Regulation 17/62: a missed opportunity to develop detailed administrative rules

In 1957 Article 85 TEC established a general clause: those conducts that directly or indirectly affected competition ought to be prohibited. There was no express reference to “*when*” they should be punished administratively.¹⁴⁷

Until the regulations or directives foreseen in Article 87.2 TFEU were passed, the agreement reached was that the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices in the common market in accordance with the law of their country.¹⁴⁸ It was for national agencies to decide and it

¹⁴⁶ Something which started with *Consten* Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 13 July 1966. English special edition Page 00299, hereinafter (“**Consten**”) and has survived to our days as the *Cartes Bancaires* case demonstrates.

¹⁴⁷ Look how different the system had become from the 1947 Prohibition of Excessive Concentration of German Economic Power which contained a specific section – in the Anglosaxon style – called “definitions” which contained the infringements that shall be included within that definition.

¹⁴⁸ See Articles 87 and 88 of the Treaty of Rome:

“**ARTICLE 87 1.** *Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a **proposal from the Commission and after consulting the Assembly [European Parliament], adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly [European Parliament].*** 2. *The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments; (b) to lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;*

is submitted that all decisions in France during that time ended without a fine.¹⁴⁹ The reason was that even after the enactment of Article 85, the exact scope of Article 85 and particularly Article 85.3 was a matter of discussion.¹⁵⁰

Thus, prior to 1962, nowhere in the Treaty it was expressly mentioned that competition law infringements were punished with a monetary sanction, it just said that those administrative sanctions should be incorporated into the legal system.

It was Regulation N°17 (First Regulation implementing Articles 85 and 86 of the Treaty),¹⁵¹ the legal norm that expressly acknowledged that violating the rules set in Article 85 was, in fact, an infringement that carried specific monetary sanctions of up to 10% of the turnover of the company in the preceding year. This might seem irrelevant today, when it is undisputed that competition law infringements should carry a fine, but if we go back to the times of *Consten* (analyzed in the next section), the perspective changes.

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86; (d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph; (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

*ARTICLE 88 Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market **in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.***”

¹⁴⁹ In fact, in 1957, as explained by the French Secretary of State of Economic Activities in its appearance before the French Assembly to provide explanations on the functioning of Article 59 bis later mirrored by article 85 TEC

Available here http://4e.republique.jo-an.fr/page2/1957_p4569.pdf?q=28+fevrier+1950
Also, (Riesenfeld, 1960) *op. cit.*

¹⁵⁰ It is submitted that it was Hans von der Groeben, the German Chairman of the subgroup dealing with competition questions (one of the authors of the Spaak Report) with close ties with the Freiburg Ordoliberal School, put forward the proposal of an Article 85.1 and 85.3 and the idea to postpone the controversial decision as how the exception of Article 85.3 should work to later on, on a specific Regulation. Later on, Mr. von der Groeben became the first Director General for Competition in the Commission and started the trend of German Director Generals. (Patel & Schweitzer, 2012) On the influence of the German Ordoliberal School in the application of Article 101 TFEU see (Faull & Nikpay, 2014) *op. cit.* The German influence was also visible on Regulation n°17 through Arved Derringer, the German rapporteur of the Regulation. See also (Deringer, 1965) *op. cit.*

¹⁵¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML>

Particularly, when one reads the very first Article of said Regulation which expressly indicated that agreements, decisions and concerted practices of the kind described in Article 85 (1) shall be prohibited, no prior decision to that effect being required.¹⁵²

Article 15, paragraph second, of Regulation n°17 read as follows:

*“The Commission **may** by decision impose on undertakings or associations of undertakings fines of from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, **either intentionally or negligently**: (a) they **infringe Article 85 (1)** or Article 86 of the Treaty; or (b) they commit a breach of any obligation imposed pursuant to Article 8 (1). In fixing the amount of the fine, regard shall be had both to the **gravity** and to the **duration** of the infringement.”*

In our opinion, in 1962, when Regulation n°17 was passed, the legislator committed a fatal mistake: not differentiating the general clause from the administrative “crime”. Up to then, the volitive element of the conduct was irrelevant; the consequence was just the prohibition and the voidness under civil law of any agreements or decisions that directly or indirectly restricted competition.¹⁵³

However, once the conduct became an “infringement”¹⁵⁴ subject to monetary penalties, there was a need to ensure that the sanctions complied with a stricter application of the principles of legal certainty, harm and culpability.¹⁵⁵

¹⁵² The fact that this provision was needed and even set out as a basic principle “*Disposition de principe*” is a very strong indicator of the ambiguity surrounding the application of the general principle and helps us understand better the abstract nature of the provision at the time. Discussing these issues, see the opinion of AG Lagrange in *Bosch* op. cit. Lagrange as explained above was the person in charge of translating and drafting the first version of the ECSC Treaty, see (Monnet, 2010) *op. cit.*

¹⁵³ See the *Bosch* judgment, 13/61, *De Geus en Uitdenboger v. Bosch and others*, [1962] ECR for a summary of the situation, particularly the AG opinion.

¹⁵⁴ In fact, reading Regulation 17/62 carefully, one realizes that the Regulation does not say that infringing Article 101 TFEU carries a sanction. Instead, what it says is that within the conducts forbidden by Article 101 TFEU, one can find punishable infringements. Notice how the French version said “*une infraction aux dispositions de l'article 85, paragraphe 1, ou de l'article 86 du traité*” and not “*une infraction de l'article*” a subtle but important nuance, similarly, the Spanish version said “*cometan una infracción a las disposiciones del apartado 1 del artículo 85, o del artículo 86 del Tratado*” and not “*una infracción del artículo ..*”

This means, in our opinion, that there was a need to clearly regulate the differences between willingness, negligence and attempt in order to fully ensure that sanctions were imposed in accordance with the basic tenets of the rule of law.¹⁵⁶ In other words, there was a need for the detailed rules foreseen in the Spaak Report or at the very least for some criteria to distinguish when the infringement should carry a monetary fine and when not.

In Regulation n°17, the legislator acknowledged that the infringement could be committed both negligently and willfully, thus, in principle, ruling out the possibility for attempt to be sanctioned. However, it made no express insinuation that these two forms should be fined differently. Moreover, it made no express differentiation between sanctioning collusion and sanctioning facilitating practices. All that was said is that the amount should take into account the gravity and the duration, but what did this exactly mean?

From the wording of Regulation n°17, one can infer that the system that was being developed was not one of objective liability (as it required the conduct to take place willingly or negligently), however it was not clarified “*how*” Article 85 TEC could be infringed. In other words, the Regulation did not shed any light on which were the facts that suited the crime and, therefore, on the knowledge that was necessary to accomplish the infringement either willingly or negligently.¹⁵⁷

In our opinion, even though it is true that Regulation n°17/62 distinguished between different fines according to the infringement (it is not the same to collude than to refuse to reply to a request for information); it did not acknowledge that even within

¹⁵⁵ An study of the application of these principles to EU administrative sanctions in (De Moor-van Vugt, 2012) *op. cit.* and (Huergo Lora, 2007) *op. cit.*

¹⁵⁶ For a summary of the principles of harm and culpability see above I.C. On the principle of legal certainty see Tridimas, T. *The General Principles of EU Law*. Oxford: Oxford University Press, 2006.

¹⁵⁷ Even though the general view is that objective liability is outside the scope of Article 101 TFEU, (Faull & Nikpay, 2014) *op. cit.* several presumptions used by the European Courts (aside of the ones already mentioned) for example, the one on parental liability raise some doubts about it, Bronckers, M., and A. Vallery. "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law." *World Competition*, 2011.

Article 101 TFEU, it was not obviously the same to collude than to facilitate collusion or to attempt to collude.

There are two reasons that justify the need for such distinction: first, because the intention of the parties is not the same and that should be taken into account when imposing the fine [**culpability**] and, secondly, because the harm or threat posed to competition is not the same either [**harm**].

Probably, the legislator had its own motives at the time not to draft a more detailed regulation, we can think of at least five possible ones: (a) the fact that **the initial drafts did not include this type of fines**¹⁵⁸ (**only fines for infringing a prohibition decision plus the procedural ones**),¹⁵⁹ (b) the inherent difficulty in drafting such provisions, (c) the struggle in reaching a political consensus,¹⁶⁰ (d) the thought that authorization system created by the Regulation would, in fact, mitigate the

¹⁵⁸ The opinion of the Economic and Social Committee to the draft of Regulation 17/62 is quite telling in this regard “*Il importe que les sanctions pour infractions aux articles 85, 1 et 86 du Traité ainsi que les règles et garanties de procédure, soient prévues les plus rapidement possible et en principe en même temps que la mise en application du premier Règlement, sans que ceci ait pour effet d’en retarder l’élaboration.*” See here <http://archives.eui.eu/en/files/inventories/15313?d=inline>

¹⁵⁹ See the article written by the first Commissioner on Competition (Von Der Groeben, 1961) *op. cit.* page 23 omitting even this possibility and the background information to the draft regulation, available at http://aei.pitt.edu/53869/1/ECIS_11.10.60.pdf

This lack of fines was criticized by the Social and Economic Committee as pointed out by Ellis, J. “Les règles de concurrence du traité de Rome applicables aux entreprises.” *Revue Internationale de Droit*, 1963: 299-328, page 315 and introduced later on, although the view back then seemed to be that were a mechanism to ensure compliance within prohibition decisions, see page 325 :

“La Commission peut infliger des amendes aux entreprises qui commettent une infraction de propos délibéré ou par négligence aux articles 85 paragraphe 1 et 86 et aux conditions imposées pour obtenir une exemption ; ces amendes varient de 1 000 à 1 million de dollars mais elles peuvent être portées à 10 % du chiffre d'affaires annuel de l'entreprise en question. Cependant, dans le cas d'accords qui ont été notifiés, cette disposition ne sera pas appliquée aux agissements décrits dans la notification. Cette disposition ne sera pas appliquée non plus, dans le cas d'ententes existantes notifiées dans les délais prescrits ni dans le cas d'ententes existantes tombant sous le régime spécial et notifiées avant le 1er janvier 1961», aux agissements qui se sont produits avant la date de notification. Cependant la non-application, citée dans les deux cas ci-dessus, ne joue pas dès lors que la Commission a fait savoir qu'après examen provisoire elle estime qu'il n'est pas justifié d'accorder une exemption à une entente tombant sous le coup de l'article 85 paragraphe 1. En outre, des amendes et astreintes sont prévues pour les infractions à certaines dispositions du Règlement et aux décisions prises par la Commission en application du Règlement”

¹⁶⁰ On this particular aspect (Patel & Schweitzer, 2012) *op. cit.*

risks of unnecessary sanctions considerably,¹⁶¹ and (d) ultimately, the strong (but incorrectly understood) power granted to the ECJ to have full jurisdiction over decisions setting out monetary fines.¹⁶²

The result was that the Courts were left with a very broad provision and forced either to incorporate both, the mental state (culpability) and fact pattern, the conduct and its threat to competition (illegality), into the wording of Article 85 TEC or to admonish the Commission severely in the first decisions.

Not surprisingly, the Courts chose the first alternative, because after all, Article 101 TFEU was then just out a very general prohibition which carried just a civil sanction,¹⁶³ and no (real) monetary sanctions were imposed yet.¹⁶⁴

¹⁶¹ On this later aspect, note that the functioning of Regulation n°17 was very specific. Under the terms of the compromise that was reached, undertakings were required to notify agreements to the Commission with the consequence that if rejected the agreement would be unlawful ab initio (obviously concerted practices could not be notified). However, even if the agreement turned out to be illegal, Article 15(5) of Regulation n°17 provided that notification prevented fines from being imposed with regard to the period between notification and the Commission's decision on the substance. Furthermore, Regulation n°17 set out, allegedly at France's request, that existing agreements were to benefit from temporary validity until the Commission had taken a decision, irrespective of whether or not they had been notified. See "the history of Article 81" *op. cit.*

¹⁶² This issue cannot be sufficiently dealt in this thesis. As it is well-known, the general view is that the ECJ has unlimited jurisdiction over the setting of the fine but not with regards other aspect of the Commission decision. However, if one looks at the recitals of Regulation 17/62, one can understand this power differently. The Commission could issue prohibitive decisions and sanctioning decisions. The ECJ's powers over these different acts should be necessarily different. This reading matches perfectly with our theory and it is supported by the following statement in the Recitals "*Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty ; whereas it is moreover desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments*". Even clearer in the French version "*considérant que toutes les décisions prises par la Commission en application du présent règlement sont soumises au contrôle de la Cour de justice dans les conditions définies par le traité et qu'il convient en outre d'attribuer à la Cour de justice, en application de l'article 172, une compétence de pleine juridiction en ce qui concerne les décisions par lesquelles la Commission inflige des amendes ou des astreintes.*"

¹⁶³ In France, the birthplace of the provision, only twenty decisions were taken between 1953 and 1960 and they ended always in a consent decree, no sanctions were imposed. (Riesenfeld, 1960) *op. cit.* Moreover, the German law up to 1957 did not mention fines since it was intended to decartelize the industry not to sanction intents to cartelize.

¹⁶⁴ Those only really became mainstream after Regulation 1/2003 and the fight against hard core cartels with an effective leniency policy.

In other words, what it should have been a clarifying and completing norm became a forwarding norm,¹⁶⁵ leaving competition law thereafter trapped in continuous circle or re-interpretation. These historical reflections shed a new light into the *Consten* judgment and the jurisprudence that followed it.

C.The Consten judgment: the beginning of the theoretical confusion

In 1966, in *Consten*¹⁶⁶ the European Court of Justice was confronted - for the first time - with a case that was complex enough to require a solid legal reasoning, as well as a thorough exegesis, of Article 85 TEC (later Article 101 TFEU).¹⁶⁷

The case concerned an appeal against the Commission decision that declared that an agreement between the TV manufacturer, Grundig, and its French distributor (Consten), was incompatible with the Treaty, due to the exclusivity clause and the territorial protection clause contained therein; jointly with a trademark authorization, which gave Consten the exclusive right to sell Grundig televisions in France and prevented it from delivering any Grundig products directly or indirectly outside France.¹⁶⁸

One of the most intricate issues was whether the agreement did actually have a negative effect on competition, given that it was not a horizontal agreement (that is, an agreement between competitors).

The answer of the European Court of Justice is well known. The Court explained that the Commission did not need to show the effects when dealing with infringements by object:

¹⁶⁵ Following Larenz's categories, see (Larenz, 2009) *op. cit.*

¹⁶⁶ *Op. cit. supra* at 146.

¹⁶⁷ Look at the opening words of AG in this case: "*The case in which I am today delivering my opinion is the first to call in question a decision of the Commission applying the law of the European Economic Community on cartels to an individual case*". Even though the case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)* ECR 235 (1966) was decided earlier, it concerned a preliminary ruling over a decision of the French authorities.

¹⁶⁸ For a summary of the case, see (Bellamy & Child, 2008) *op. cit.* page 145 and seq.

*“for the purpose of applying Article 85 (1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition”*¹⁶⁹

In addition, the Court ruled that an absolute territorial restriction on sales was, indeed, a restriction by object, because it had as its purpose to restrict competition. Based solely on a literal interpretation of the Treaty, the Court held that:

“Neither the wording of Article 85 nor that of Article 86 gives any ground for holding that distinct areas of application are to be assigned to each of the two Articles according to the level in the economy at which the contracting parties operate”.¹⁷⁰

If confronted against the AG opinion, one realizes that the Court’s judgment only undertook a literal (and simplistic) interpretation of Article 85 TEC. There was no historical analysis of the provision, no study of comparative law, no research on the purposes behind the provision, no reference to the preliminary drafts of the Treaty, just vague references to the wording of the Treaty and inferences about the legislators’ intention not to repeat the same terms in such a short provision.¹⁷¹

In retrospective, it seems incomprehensible that the Court did not search for any of the discussions during the drafting process. If they had done so, they could have discussed whether the following quote by the French delegates (during the discussions over Article 85) shed some light, or not:

¹⁶⁹ *Consten* at page 339.

¹⁷⁰ *Consten* at page 339. See Alfaro, arguing that since Article 101 TFEU is an open clause it should be interpreted strictly as not to expand its sphere of application disproportionately which in his opinion the Court did not do. Alfaro, J. "Delenda est Consten v. Grundig." *Blog Derecho Mercantil*, July 29, 2013. A summary of his views on the case in (Alfaro, *El Proceso de Configuración del Derecho de la Competencia a la luz de la doctrina del Tribunal de Justicia de la Unión Europea*, 2014) *op. cit.*

¹⁷¹ One of the possible explanations for such a succinct analysis might be that even within the Commission there were serious doubts about the decision taken. According to (Patel & Schweitzer, 2012) *op. cit.* page 27 “*Manfred Caspari, von der Groeben’s deputy chef de cabinet (and DG’s Director General in the 1980s), recalled that his pioneering decision was pushed by VerLoren van Themaat, but resisted by the Commissioner.*”

*“Aucune entreprise ... ne peut agir de concert avec une autre entreprise, conclure aucun accord, dont le but ou le résultat direct ou indirect serait dans le marché commun: a) d’empêcher; restreindre ou altérer de quelque manière que ce soit le jeu normal de la concurrence et notamment de fixer le prix; b) de restreindre ou contrôler la production de quelque manière que ce soit; c) de répartir les marchés, produits, clients ou sources d’approvisionnement.”*¹⁷²

In our opinion, as explained before, this statement confirms that the drafters’ intention was to protect competition: (a) in cases where the parties intended to infringe competition law voluntarily (“*le but*”), as well as (b) those where the result (independently of the parties’ willingness) of their actions “*direct ou indirect*” affected competition.

Nonetheless, one thing is what they wanted to prohibit and a very different thing what they wanted to punish, and how they wanted to punish it. After all, as we already explained, in administrative law not all prohibitions carry out a monetary penalty; in fact, many of them just carry out compensatory measures in order to reestablish the situation prior to the conduct.¹⁷³

In addition, the Court, probably influenced by the American distinction between the per se rule and the rule of reason,¹⁷⁴ introduced a procedural presumption without clearly stating so. Given that the Treaty distinguished between agreements by object or effect and this one had an anticompetitive object, the Court concluded that there was no need to show the effects on the market.

To summarize, in *Consten*, the Court intermingled what should have been three very different aspects of the debate, in just two words: “object and effect”.

¹⁷² (Chirita, 2013) *op. cit.*

¹⁷³ (Nieto, Derecho Administrativo Sancionador, 2012) *op. cit.*, García de Enterría, E., and T.R. Fernández. *Curso de Derecho Administrativo*, Tomo II. Pamplona: Thomson-Reuters, 2011.

¹⁷⁴ The American influence is clearer in the AG Roemer opinion. See also his opinion in *Société Technique Minière op. cit.*

First, that the distinction between object and effect was originally a mechanism to *prohibit* all conducts which, purposely or not, prevented, restricted or distorted competition.

Secondly, that one thing was the scope of the prohibition and a different thing the scope of the penalty. In other words, that there could be infringements of Article 85 which should be prohibited but not sanctioned.¹⁷⁵

Thirdly, that this case concerned a prohibition and not a sanction. Therefore, the statements made should not be understood as meaning that the parties intended to infringe competition law. Otherwise, the Commission would have fined Grundig.

This was the result, as explained above, of the forwarding situation created by Regulation 17/62. We want to make clear that we do not mean, in any way, that the outcome in *Consten* was legally wrong. In our opinion, what the Court did was to undertake a contractual approach to the term “*object*”, the object of the contract (“*l’objet du contrat*”).¹⁷⁶

Since the contract included territorial restrictions (a prohibition on parallel trade),¹⁷⁷ it was unlawful by object. In other words, the specific conduct regulated in the contract was contrary to public law and, for that reason the contract had an illegitimate object. Put it simply, the actions that the contract foresaw were contrary to public law. If the parties chose to include a provision against public law, it is because they wanted to restrict competition. The parties had infringed competition law because they included those clauses in the contract.

¹⁷⁵ This is something different thing from acknowledging that the fines could be symbolic. The words symbolic fines inherently carry the idea that there should always be a fine.

¹⁷⁶ Following what the Commission had done in its decision. See Commission Decision OJ 2545/64 L 161: “*Par conséquent, la constatation que les parties aux contrats ont voulu que Consten soit affranchi de la concurrence d’autres importateurs pour l’importation et la distribution en gros des produits Grundig en France, suffit pour conclure que le jeu de la concurrence est restreint au sens de l’article 85 paragraphe 1.*”

¹⁷⁷ *Consten* cannot be interpreted in abstract but by reference to the coetaneous decision of the ECJ in *Société Technique Minière*, *op. cit.* where the Court held that absent evidence of effects on the competition on the market, an exclusive dealing agreement should not be deemed as anticompetitive by object, particularly when it does not include any prohibitions on parallel trade. The AG Roemer referred to this analysis expressly as a “rule of reason” analysis.

In fact, despite all the criticisms, one could read *Consten* as the joint application of Articles 101.1 and 101.2 to a specific contract. If Article 101.1 TFEU was a prohibitive and imperative norm, its infringement even formally had to carry out a consequence: its voidness. In other words, Grundig had infringed Article 101 at least formally (*antijuridicidad formal*) and, therefore, the consequence was the lowest sanction possible, voidness.

It is true that neither the reason why this clause was contrary to public law, nor the distinction between exclusive dealing and prohibition on parallel imports, is clearly articulated in the judgment.¹⁷⁸ Probably, at that stage of the development of the Single Market, it was necessary to prevent territorial fragmentations at any cost.

Nonetheless, we must contend that if the problem was one of burden of proof and if the Court needed to give a little help to the Commission, it could have done so in a different way. For example, it could have said that even if the contract had a reasonable business explanation it could have a potential detrimental effect on competition and that, in those circumstances, given the limited knowledge, the prohibition of those clauses seem reasonable given that there was no monetary penalty attached to it. In other words, a brief but solvent incursion into the effects of the conduct, such as the one suggested by the Advocate General Roemer in his opinion on the case, without having to walk within the moving sands of the principle of culpability.¹⁷⁹

The *Consten* decision has been criticized on many aspects and some authors even consider it the original sin in most of the problems that affect competition nowadays.¹⁸⁰ Even though we agree that many problems can be traced back to *Consten*, we believe that this is a rather harsh conclusion.

The problem was not what the Court said in *Consten* but, rather, how *Consten* was applied later on or more subtlety, how the ECJ forgot that *Consten* is a prohibition decision applying a general clause, not the infringement of an administrative rule.

¹⁷⁸ Heavily criticizing *Consten*, (Alfaro, El Proceso de Configuración del Derecho de la Competencia a la luz de la doctrina del Tribunal de Justicia de la Unión Europea, 2014) *op. cit.*

¹⁷⁹ See the opinion of the AG Roemer, in particular, pages 358 to 360 of the English version, which was more consistent with the Court's judgment in *Société Technique Minière*.

¹⁸⁰ (Alfaro, Delenda est *Consten v. Grundig*, 2013) *op. cit.*

In fact, we firmly believe that the *Consten* decision would not have been a problem if the judgment had been applied analytically afterwards. By this, we mean if the Courts would have paid more attention to the particular circumstances that surrounded *Consten*, when they used it later on as a guiding precedent.

This is a problem that can be extrapolated to many ECJ judgments, particularly in the field of concerted practices, as we will explain later on. We shall keep in mind that the *Consten* case had three very particular circumstances which are not present in the purely horizontal cartel cases that came later on:¹⁸¹

(a) there was **no monetary sanction**; the Commission only forbade certain clauses of the agreement but it did not fine the Companies; the decision was taken in accordance with the system in place prior to Regulation 1/2003;

(b) the case concerned a **written contract** (i.e. a written agreement); and

(c) it was a **vertical relationship** not a horizontal one.¹⁸²

In short, between 1957 and 1966 there was a chain of events that ended up with Article 101 TFEU encompassing a procedural rule, a general principle and an administrative offence within its wording.

¹⁸¹ It is important to notice that the first leniency policy in Europe dates back only to 1996 and it became successful after considerable alterations in 2002. Sandhu, J. "The European Commission's Leniency Policy: A success?" *E.C.L.R.*, 2007: 148-157. The focus of the European Commission on cartels only started after the modernization package in 2003, see the White Paper, (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 45 "There is today an obvious need to refocus the Commission's implementation of Article 85, allowing it to use its resources to combat cartels, particularly in concentrated markets and in markets which are being liberalised. Instead of having to adopt a reactive stance in the face of the large number of notifications it has to handle, the Commission should be able to be proactive and to pursue own-initiative procedures against restrictive practices and abuses of dominant positions that seriously restrict competition and threaten market integration". See also Wils, W. "Ten Years of Regulation 1/2003 - A Retrospective." *Journal of European Competition Law & Practice*, 2013.

¹⁸² See (Lianos, Some Reflections on the Question of the Goals of EU Competition Law, 2013) *op. cit.* emphasizing that "In the seminal cases of *LTM/MBU*, *Consten & Grundig* and *Italian Republic v. Council*, despite the opinions of Advocate General Roemer, the ECJ did not draw any distinction between vertical and horizontal agreements with regard to their anticompetitive effect."

Moreover, from there onwards, competition law has consistently focused on a literal or grammatical interpretation to Article 101 TFEU,¹⁸³ and, as result, has remained trapped in universe of words that was ambiguously designed on purpose.

D.Regulation 1/2003: a missed opportunity to conceptualize the system and develop adequate rules

In the beginning of the twenty first century, competition law in the European Union undertook a considerable change. The realization that the Commission could not employ its resources in the most serious conducts (due to the burden of the notification system designed by Regulation 17/62), the upcoming entry of the former soviet countries into the Union and the backlashes in Luxembourg in three important decisions in a very short period of time,¹⁸⁴ were some of the reasons that motivated a shift that included moving from: (a) a notification system to an ex-post control system, and (b) a legalistic approach to article 101 TFEU to a more “economic” or “effects based” approach.¹⁸⁵

During this time the position of the Chief Economist was created, the Leniency Policy was given a serious political push, and the legal framework was considerably altered with a new regulation (Regulation 1/2003) that superseded Regulation 17/62.

This chain of events known as the “modernization package” started at the end of the nineties when the “*groupe de modernisation*” was created.¹⁸⁶ The meetings of this group ended with the publication of a white paper which clearly shows the uncertainties that surrounded Article 101 TFEU at the time. The white paper analyzed two broad alternatives: (a) improving the authorization system or (b) switching to a directly applicable exception system.

¹⁸³ A mere overview of the table of contents of (Bellamy & Child, 2008) *op. cit.* and (Faull & Nikpay, 2014) *op. cit.* clearly shows the fragmented and grammatical approach that has been taken since then to Article 101TFEU and which is also present in the opinion of Advocate General Roemer in *Société Technique Minière*.

¹⁸⁴ The famous Airtours, Tetra Laval and Schneider which are discussed in almost all competition law books. For a good summary (Faull & Nikpay, 2014) *op. cit.*

¹⁸⁵ (Wils, Ten Years of Regulation 1/2003 - A Retrospective, 2013) *op. cit.*

¹⁸⁶ (Wils, Ten Years of Regulation 1/2003 - A Retrospective, 2013) *op. cit.*

The first option was divided in four alternatives: (a) a new interpretation of Article 85 so as to include analysis of the harmful and beneficial effects of an agreement in the assessment under Article 85(1);¹⁸⁷ (b) the decentralization of the application of Article 85(3) sharing the power to apply it and allocating cases between the Commission and national competition authorities on the basis of their center of gravity;¹⁸⁸ (c) broadening the scope of application of Article 4(2) of Regulation n°17, extending further the exception to the notification requirement provided for in Article 4(2) of Regulation No 17;¹⁸⁹ or (d) a procedural simplification.¹⁹⁰

At the end, the Commission chose to adopt a directly applicable exception system allowing *ex post* supervision of restrictive practices. The switch to such a system was achieved by a Council Regulation (1/2003), based on Article 87 of the Treaty, which stipulated that all national authorities or Courts before which the applicability of Article 85(1) of the Treaty was invoked could also consider the applicability of Article 85(3).¹⁹¹

¹⁸⁷ Application of the exemption provided for in Article 85(3) would then be restricted to those cases in which the need to ensure consistency between competition policy and other Community policies took precedence over the results of the competition analysis (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 56.

¹⁸⁸ The criteria for determining the center of gravity of a case would be not only the effects of the agreement or practice, but also the need to safeguard competition effectively. Some cases of Community relevance would be reserved to the Commission: these would include cases that raised a new legal issue and cases involving application of Article 90 of the Treaty.

¹⁸⁹ The advantage of such a change for the undertakings concerned would be that, even in the event of late notification, the Commission could assess whether the restrictive practices satisfied the conditions of Article 85(3) and, if so, could adopt an exemption decision that would be effective from the date on which the agreement was concluded. Thus, undertakings' legal certainty would be enhanced as this would prevent agreements falling within the scope of Article 85(1) which have not been notified from being automatically void (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 64

¹⁹⁰ The simplifications discussed included abolishing the requirement of translation into all Community languages, both in the case of Article 19(3) notices and in the case of decisions, and the simplification of Advisory Committee consultation procedures (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 66

¹⁹¹ (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 69; also (Schaub, 2001) *op. cit.* and (Wils, Ten Years of Regulation 1/2003 - A Retrospective, 2013) *op. cit.*

According to the Commission, Article 85 would then become “a unitary norm comprising a rule establishing the principle of prohibition”, unless certain conditions were met. The whole of Article 85 would then become a “directly applicable provision which individuals could invoke in court or before any authority empowered to deal with such matters”.¹⁹²

Moreover, this interpretation would have the effect of making restrictive practices which are prohibited by Article 85(1) - but which meet the tests of Article 85(3) - lawful without the need for any prior decision.

Similarly, restrictive practices that restricted competition would be unlawful once the conditions of Article 85(3) were no longer fulfilled. This new framework would mean that restrictive practices would no longer have to be notified in order to be validated.

However, despite the careful analysis of the alternatives, there was not, in our opinion, a serious study into the consequences of the change of system into the fining policy. Indeed, Regulation 1/2003 merely copied the text of Regulation 17/62 with regards to fines. This seems, in retrospective, a double mistake:

First, because as we know this provision had not been carefully discussed as it was introduced after the Social and Economic Committee pointed out the need to be regulated at the same time as the entry into force of the Regulation,¹⁹³ thus suggesting that they should be the subject of its own Regulation.¹⁹⁴

¹⁹² (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 69.

¹⁹³ Indeed, the report which is available at the historic archives of the European University Institute expressly said in the recitals “*CONSIDERANT que les amendes et astreintes prévues au projet de Règlement ne sanctionnent que la non-observance de règles administratives*” and concluded later on “*Il importe que les sanctions pour infractions aux articles 85, 1 et 86 du Traité ainsi que les règles et garanties de procédure, soient prévues les plus rapidement possible et en principe en même temps que la mise en application du premier Règlement, sans que ceci ait pour effet d’en retarder l’élaboration.*” See here <http://archives.eui.eu/en/files/inventories/15313?d=inline>

¹⁹⁴ This conclusion can be extracted from the following paragraph at a previous stage of the opinion: “*Il serait souhaitable que ces lacunes soient comblées les plus rapidement possible para des règleemnts ultérieurs et que que le Comité Economique et Social soit apelé à donner son avis sur une réglementation complète.*”

Secondly, because the change from an *ex ante* notification to an ex-post control, changed drastically the importance and the likelihood of companies being sanctioned and, therefore, the need for legal certainty and for a more careful application of the principles criminal law even if nuanced to a, seemingly, administrative procedure.

We do not mean by this that the path taken by Regulation 1/2003 was wrong. Quite the contrary, it has certainly helped expand a competition law culture and considerably helped the Commission to focus its efforts on hard-core cartels. It could just have been more carefully designed. During the drafting of the Regulation, cautions were made against the risk of losing legal certainty in the application of competition law, respected voices (such as those of Wolf,¹⁹⁵ Forrester¹⁹⁶ or Siragusa¹⁹⁷) signaled these risks.

Indeed, Wolf, president of the Bundeskartellamt pointed out that the reasons that pushed for a notification system in 1962 had not changed in the 2000 and that the main disadvantages of a prohibition system were still as valid as back then.¹⁹⁸ Forrester argued that it was appropriate to think seriously about the problem of incompatibility

¹⁹⁵ Wolf, D. "Comment on the White Paper on the Reform of EC Competition Law." In *EC Competition Law Reform*, by B. Hawk. New York: Juris Publishing Inc., 2002.

¹⁹⁶ Forrester, I. "Modernization of EC Competition Law." 23 *Fordham International Law Journal* 4, 1999, available <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1689&context=ilj>

¹⁹⁷ Siragusa, M. "A Critical Review of the White Paper on the Reform of EC Competition Law." 23 *Fordham International Law Journal* 4, 1999. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1690&context=ilj>

¹⁹⁸ He argued that the main problem "was thought to lie in the fact that until a decision was made neither the parties to the proceedings nor any third parties involved would know whether an activity was legal or not. Furthermore, it would be possible for undesirable restraints of competition to be operated for a long time before being examined and prohibited. In the end the Single Market Committee and the European Parliament held that these disadvantages predominated (...) I can only endorse this assessment also from today's perspective. Nothing has changed in the legal situation and as far as the expected disadvantages are concerned. We will therefore have to deal with the same question that was being asked 30 years ago: is a reduction in the Commission's workload really a sufficient reason for putting up with what were already considered serious disadvantages decades ago? The Commission also promises us that the directly applicable exception will increase the deterrent effect of fines because immunity from fines conferred by notification would be removed. While this is true, it is still not the whole truth. Except for naked cartel agreements, it will be difficult in future to prove a firm's bad faith when it is engaged in cooperation arrangements. At present there is the presumption of illegality for anyone engaged in horizontal restraints of competition without having sought an exemption. In future there would probably be a presumption in favour of the freedom of contract ...". (Wolf, 2002) *op. cit.*

with the Human Rights Convention before Regulation 17/62 was redrafted.¹⁹⁹ Nonetheless, the general view among commentators seemed to be optimistic about the future functioning of Regulation 1/2003, even within much respected practitioners such as Hawk:

*“we believe that there is today considerable legal certainty under EC law as to which agreements will result in fines. Thus, the abolition of the notification system will not reduce certainty this respect (...) there is, however, significant uncertainty about the amount of fines that will be imposed in a particular case”*²⁰⁰

Indeed, the Director General at the time pointed out:

*“Some commentators on the White Paper argue that the Commission’s reform proposal increases the risk of unforeseeable fines due to a lack of predictability in the new system. It should first be noted that it is a long standing practice of the Commission to impose fines only in case where it has been clearly established, either in horizontal instruments or in prior case law or administrative practice, that certain behavior constitutes an infringement of the antitrust rules (...) **this policy will not change**”*²⁰¹

This optimistic perspective was to a large extent embedded into the White Paper²⁰² and, probably, explains why Regulation 1/2003 was not designed in such a

¹⁹⁹ (Forrester, 1999) *op. cit.* page 1082.

²⁰⁰ Hawk, B. "The Development of Articles 81 and 82 EC Treaty: Legal Certainty." In *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, by C. Ehlermann, & I. Atanasiu, 129-145. Portland: Hart Publishing, 2001.

²⁰¹ (Schaub, 2001) *op. cit.*

²⁰² (Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999) *op. cit.* para. 70: *“The adoption of such a system in Community law is now possible because of the changes and developments that have occurred in Community competition law since 1962. The legislative framework in the competition policy area has been considerably strengthened, and the reforms currently under way on vertical restrictions and horizontal cooperation agreements will help to simplify and clarify it further. While there were legitimate doubts in 1960 as to the scope of the conditions for exemption under Article 85, the Commission’s decision-making practice, the case-law of the Court of Justice and the Court of First Instance and the various block exemption regulations and general notices have made the conditions governing exemption much clearer.”*

way, as to develop in further detail the prohibitions entrenched within Article 101 TFEU, as it should have done.

In retrospective, the Commission's views – even though naïve - might be partially justified. It is true that some fault should lay on the Commission, who had not been confronted with sufficient number of hardcore cartels to develop a clear concept of the meaning of infringement by object.²⁰³ However, in fairness, it was impossible to foresee that the European Courts would be so lenient in their review of the concepts of willingness and negligence, particularly, with regards to the concept of infringement by object. In fact, the literature at the time, could not foresee the evolution that would take place in the Commission's practice.²⁰⁴

As some commentators have cleverly pointed out,²⁰⁵ the Commission's practice in recent years has shown an increasing reliance on the "by object" analysis when applying Article 101(1) TFEU, which was often done in a rather simplistic and formalistic way. In the last 10 years the Commission has issued 12 Article 101(1) TFEU (non-cartel) infringement decisions, in 10 of which competition was considered restricted "by object".²⁰⁶

²⁰³ Between 1990 and 1999, only 20 cartel decisions had been taken. Between 2000 and 2009, 63 decisions had been taken. Presentation by Professor Alfaro, "*La Lucha Contra los Cáteles: Crisis o Éxito*" on file with author.

²⁰⁴ See (Wolf, 2002) *op. cit.* and Wils, W. "Optimal Antitrust Fines: Theory and Practice." 29 World Competition 2, 2006, *op. cit.* and (Schwarze & Bechtold, 2008) *op. cit.* "*It is probably not an exaggeration to state that at the time Art. 15 of Reg. 17 was adopted, it was by no means conceivable that the fines would reach such (exorbitant) levels under one and the same regime.*"

²⁰⁵ Latham & Watkins Client Alert. "By Object Restrictions of Competition Revisited: European Court of Justice Endorses Narrow Interpretation." *Client Alert News Flash* 1741, 2014.

²⁰⁶ In the period from 01/01/2004 to 31/06/2014, the Commission found anticompetitive practices to restrict competition "by object" in the following cases: case COMP/39685 – Fentanyl [2013]; case COMP/39226 – Lundbeck [2013]; case COMP/39839 -Telefónica and Portugal Telecom [2013]; case COMP/39510 – Ordre National des Pharmaciens en France (ONP) [2010]; case COMP/38606 – Groupement des cartes bancaires "CB" [2007]; case COMP/38698 – CISAC [2008]; case COMP/38662 - GDF/ENEL [2004]; cases COMP/36623, COMP/36820, COMP/37275 – SEP et autres/Peugeot SA [2005]; case COMP/38549 -Barème d'honoraires de l'Ordre des Architectes belges [2004]; case COMP/37980 - Souris – Topps [2004]. The only decision in which the Commission judged the practice anticompetitive by its effects on competition was adopted in case COMP/37860 –Morgan Stanley/Visa International and Visa Europe [2007]. In case COMP/34579 – Mastercard I [2007], Commission admitted that it cannot reach a 'definite conclusion' as to whether the alleged practice concerns a restriction by object (see recital 407 of the decision). Extracted from (Latham & Watkins Client Alert, 2014) *op. cit.*

According to these practitioners, this record suggests that the Commission — probably prompted by the desire to achieve procedural economies — opts for the “by object” box whenever possible to avoid the need to perform a full effects analysis before considering efficiency benefits under Article 101(3) TFEU. To avoid such analysis the Commission has sought to create new categories of “by object” infringements that in the past would most likely have been treated as restrictions “by effect”.²⁰⁷

Nonetheless, the time might be ripe for change again, as identified by Commission Officials, such as Mr. Italianer (DG Comp, director General) “[A]part from cases like price-fixing, output limitations and the like, the line between restrictions by object and those by effect is not always bright.”

It might be, therefore, the adequate moment to start drawing the line or at the very least providing the Authorities with the right pencils.

PART TWO - INFORMATION EXCHANGES: A GREY ZONE OF ARTICLE 101 TFEU

Having laid out our theoretical understanding of Article 101 TFEU and the duality between the general clause and the administrative offence and sanction, it is time to confront our dogmatic interpretation of Article 101 TFEU, against self-standing information exchanges. There are several motives that, in our opinion, justify the choice for this particular infringement as a test of the boundaries and the strength of Article 101 TFEU.

First, information exchanges are at the heart of most European and national investigations nowadays. In fact, they cover a substantive part of the Commission’s Guidelines on Horizontal Cooperation.²⁰⁸ In bureaucratic terms, they are a “policy priority”.

²⁰⁷ (Latham & Walkins Client Alert, 2014) *op. cit.*

²⁰⁸ European Commission, *Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements*. Official Journal of January 14, 2011 (2011/C 11/01).

It is not hard to see why. In the age of telecommunications, confidential information is a very precious commodity, in fact, probably “*the most valuable commodity*”.²⁰⁹ The European Union has matured and so have the market players. Today, the “smoked filled” rooms have disappeared and the traces of any anticompetitive behavior are harder to find. Thus, it comes to no surprise that information exchanges (preventing and punishing them) has become so important for Public Authorities.²¹⁰

Secondly, it is very difficult to label them as competitive or anticompetitive ex ante. Information exchanges were seen, many years ago, just as a way to put in place a cartel or a mechanism to enforce the functioning of cartel, by checking if everyone was complying. Later on, they were labelled a facilitating practice or a plus factor (a very useful piece of evidence for the Commission when lacking a smoking gun). As the years passed, the facilitating practice became a self-standing infringement and more recently, surprisingly, even an infringement by object.

The economic literature has made a substantial contribution in this regard by explaining under which circumstances decreases in uncertainty as to certain parameters can have pro-competitive effects and/or anti-competitive effects. Nonetheless, there are so many parameters and variables that clear-cut rules are difficult to make.

In fact, even today, the European Commission is reluctant to acknowledge any type of safe harbors for information exchanges. All we know is – by looking at the Guidelines and the Commission’s practice – that private information exchanges about

²⁰⁹ From Francis Ford Coppola’s movie, Wall Street.

²¹⁰ Information exchanges have always been looked with suspicion by Competition Authorities. The reason is obvious. As Adam Smith pointed out centuries ago, people of the trade seldom meet together if it is not to conspire to collude in some way or another. Smith, A. *An Inquiry Into the Nature and Causes of the Wealth of the Nations*. London: Methuen & Co., 1904, available at <http://www.econlib.org/library/Smith/smWN4.html> When Adam Smith wrote his famous work, he was probably thinking more in cartels, than in the problems associated with decreases in uncertainty in tight oligopolies with homogenous products. Nevertheless, the intuition is the same: competitors rarely disclose information to their counterparts unless it is to reach a result that it is beneficial to them, so beware of their intentions.

future individualized prices and quantities are absolutely do-nots,²¹¹ the rest remains in a grey area subject to a case by case review.

Thirdly, they anticipate the frontier of protection to an extent that raises serious issues about their compatibility with the basic principles of harm and culpability that should guide any (quasi) criminal law system.

From a theoretical perspective, exchanging information is not a crime, the crime is to collude. Information exchanges without actually fixing prices or quotes are indirect evidence of that intention to collude. The problem is that, in some cases, they might be the only evidence supporting the existence of collusion. Then, the facilitating practice becomes a self-standing infringement, with the conceptual problems that this encompasses.

This makes this infringement very interesting, particularly, when dealing with unilateral exchanges of information since the current understanding of Article 101 TFEU only allows Competition Agencies to categorize them either as a hard core cartel or a completely harmless practice, but nowhere in between.

Fourthly, given the circumstances explained above, the Competition Authorities crusade against information exchanges has come at the expense of legal certainty. As we will demonstrate, the willingness to avoid any preparatory acts that might result in a hard core cartel, has resulted in an extremely obtuse and counter-intuitive definition of concertation and concerted practices.

This is not a novel pattern in EU Competition law. In fact, it resembles to some extent the ambiance in the 1960's, when the ECJ ruled on the seminal *Consten* case.²¹² By this, we mean a time where the ultimate goal - ensuring competition in the single market - clashes with the logical limits, that any (quasi) criminal law sanctioning system requires under the rule of law.

²¹¹ And even some (few) economists challenge this, see Padilla, J. *The elusive challenge of assessing information sharing among competitors under the competition law*. OECD Policy Round Tables, 2010.

²¹² *Op. cit. supra* at 146.

In *Consten*, the issue concerned the meaning of a cartel, in *T-Mobile*, the meaning of concertation. *Consten* was a vertical case that paradoxically, set out the underpinnings of the ECJ's understanding on cartels.²¹³ The same way that *T-Mobile*²¹⁴ is nowadays the seminal information exchange case, even though there was not actually an exchange between competitors, but just a mere unilateral disclosure.

We firmly believe that in order to better understand what Article 101 TFEU forbids, and how Article 101 TFEU works, we need to explore its limits and nothing better for that, than information exchanges, where Authorities sanction not collusion on itself, but behavior that may end up in collusion and even so, only under some (not very clear) circumstances.

Understanding how this (controversial) facilitating practice is encapsulated within Article 101 TFEU, we will be able to understand exactly the confines of this flexible and elusive norm and test the merits of our theory.

IV. THE ECONOMIC THEORY ON INFORMATION EXCHANGES: A PANOPLY OF POSSIBILITIES

Before embarking in the legal analysis of information exchanges, it is indispensable to understand their impact on competition from a purely economic perspective.²¹⁵ Otherwise, we will lack the necessary elements to assess, later on, the

²¹³ *Id.*

²¹⁴ C-8/08, *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 (“**T-Mobile**”).

²¹⁵ (Padilla, 2010) *op. cit.* As Professor Padilla indicates, “*the competitive assessment of information sharing among competitors is one of the more complex issues, if not the most difficult issue, in competition economics and law*”. According to this author, the vast literature on the topic can be divided into four main branches: “First, a pro-competitive effects strand which has identified circumstances when information sharing among competitors may facilitate the efficient functioning of markets and enhance competition. Second, an anti-competitive effects strand that has found that the exchange of commercially sensitive information may, under certain circumstances, facilitate tacit collusion and thus harm consumers. Thirdly, a unilateral effect strand which has focused on the impact of those exchanges of information on the strength of competition absent any tacit or explicit co-ordination. This literature has found that those exchanges may relax or strengthen competition depending on the nature of the uncertainty that they contribute to reduce (demand uncertainty or uncertainty over costs) and the mode of competition (prices or quantities). Fourthly, the “cheap talk” strand of the literature that has discussed whether a mere exchange of information involving no commitment to adopt any particular course of action can have a real effect on competition. This literature has not reached a consensus and some authors

reasonability of the legal rules applied, and the adequacy of the actions taken by Competition Authorities.

Moreover, the review of the economic theory will help us understand why information exchanges lay exactly at the frontier between the general clause and the administrative offence. In other words, we will show how the panoply of economic effects of information exchanges justifies many different solutions which move along a very broad spectrum - from the positive information exchanges to those which just hide a cartel. This finding will help us understand much better the, otherwise seemingly inconsistent, case law of the ECJ, particularly when compared with the decisional practice of some national authorities, which will be the subject of study of second limb of this Part Two of the dissertation.

We shall start by making two caveats.

First, information exchanges do not harm competition, they endanger it. They are a “facilitating” practice in taking other actions that harm competition.²¹⁶ In other words, information exchanges are not an end but a tool, a tool towards collusion.²¹⁷

Secondly, self-standing information exchanges are no different from an economic perspective from information exchanges as facilitating practices. The theories of harm are equally applicable and, to our knowledge, there are no specific theories of harm which result exclusively from self-standing information exchanges.

It might seem strange at first for a lawyer that the same “theory of harm” can amount to two very different legal categories, a facilitating practice (i.e. a plus factor) or a self-standing infringement. This might be explained by the fact that the concept of

conclude “cheap talk” cannot condition the behavior of rational, profit-maximizing agents, while others maintain the exact opposite conclusion”.

²¹⁶ Kaplow, L. "An Economic Approach to Price Fixing." *John M. Olin Center for Law, Economics and Business*, 2011. Caffara, C., and K.U. Kuhn. "The Cost of Simplistic Rules for Assessing Information Exchange: the Italian jet fuel decision." *The Pros and Cons of Information Sharing*, 2006. Kuhn, K.U. "Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results." *OECD Report*, 2010.

²¹⁷ Werden, G. "Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory." 71 *Antitrust L. J.* 719, 2004. Kovacic, W., R. Marshall, L. Marx, and H. White. "Plus Factors and Agreement in Antitrust Law." 110 *Michigan Law Review*, 393, 2011.

collusion for an economist is quite different from the concept of a cartel for a lawyer and, also, because even if certain exchanges can facilitate a collusive result, some might more “facilitating” than others since, like any other process, there is a moment where the ultimate conduct is completed.

A. Understanding collusion and what information exchanges tell us (hypothetically) about its possible existence²¹⁸

For any lawyer the classic example of collusion is a cartel, that is an agreement among otherwise competing firms to sell at a price which has been previously agreed or at level of output, previously agreed upon, which is above the competitive price or output.²¹⁹

If we ask the same question to an economist, he will say that our definition is an example of a collusive equilibrium and argue that collusive equilibriums have the characteristics described, save for the need to reach an “agreement”.²²⁰ He will tell us

²¹⁸ We do not attempt to review the literature on collusion systematically which will take an entire book on itself but rather to provide some basic notions. Good summaries can be found in Kaplow, L., and C. Shapiro. "Antitrust." NBER Working Paper Series, 2007. Shapiro, C. "Theories of Oligopoly Behavior." In *Handbook of Industrial Organization*, by R. Schmalensee, & R. Willig, 329-414. North-Holland Amsterdam, 1989, (Motta, 2004) *op. cit.*, Ivaldi, M., B. Jullien, P. Rey, P. Seabright, and J. Tirole. "The Economics of Unilateral Effects." *European Commission*, 2003. and Ivaldi, M., P. Rey, P. Seabright, J. Tirole, and B. Jullien. "The Economics of Tacit Collusion" *European Commission*, 2003. (Ivaldi, Rey, Seabright, Tirole, & Jullien, 2003) and (Bishop & Walker, The Economics of EC Competition Law: Concepts, Application and Measurement, 2010) *op. cit.*

²¹⁹ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and Its Practice*. West Group, 1999. It is submitted that six conditions must exist for a cartel to succeed for any length of time: First, the product or service to be cartelized must define a relevant market with sufficient high barriers to entry that newcomers cannot undermine the cartel's pricing decisions. Second, the cartel members must produce a sufficiently large share of the product or service in order for their decisions not to be undermined by producers who are not a member of the cartel. Third, the cartel members must be able to reach an agreement about the output or the price. Fourth, the cartel must be able to detect cheating by cartel members. Fifth, the cartel must be able to punish cheating effectively. Sixth, the cartel must be able to do all this without being detected from the outside.

²²⁰ There is a wealth of literature on collusion, starting with the basic works on industrial organization. However, for more a concise explanation on both sides of the Atlantic, see (Kaplow & Shapiro, Antitrust, 2007) *op. cit.* and (Ivaldi, Rey, Seabright, Tirole, & Jullien, 2003) *op. cit.* (Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, 1999) *op. cit.* pages 164 and 165.

As Hovenkamp points out - when talking about US competition policy - one reason antitrust law has had so little success with oligopoly is its continued adherence to a common law (i.e. contractual) concept of

that even though a cartel is an example of collusion, not all collusive equilibriums are cartels; a subtle but very important aspect.

The essence of collusion for an economist is that firms stop behaving like competitors and start adopting a behavior similar to that of a single dominant firm.²²¹ What puzzles economists is that, under certain circumstances, competitors might choose a course of action which, if observed only the perspective of a single firm is not the most profitable one, but when looked from the perspective of the entire industry (or a substantial portion of it) yields better results, even though it might leave consumers worse off.²²²

Thus, whether this outcome is the result of an explicit agreement between the parties or the result of some looser form of interaction is of secondary relevance.²²³

“agreement” that makes little sense in the context of strategic behavior among competing firms. In his view, non-cooperative oligopoly situations are often more stable, and thus more easily sustained, than cooperative ones. (Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 2004), *op. cit.* page 735 distinguishing between “spoken”, “unspoken” agreements and interdependence, instead of express and tacit collusion.

²²¹ In other words, in order to obtain supra-competitive profits in an otherwise competitive market, firms must reach a certain degree of market power that allows them to price their products over their marginal cost, without fear of losing sales to other competitors, either actual or potential. Thus, they need to concentrate a proportion of the market’s share of supply significant enough to allow them to reduce output and increase prices collectively as one single monopolist would do. See Ortiz Blanco, L. *Market Power in EU Antitrust Law*. Oxford: Hart Publishing, 2011.

²²² (Ivaldi, Jullien, Rey, Seabright, & Tirole, 2003) *op. cit.* “*Tacit collusion, in contrast, requires that a firm make a choice which would not be in its interest if it assumed that other firms would be uninfluenced by its choice. For instance, under tacit collusion a firm can choose to set an output which, when added to the output produced by other firms, yields the monopoly output in the market as a whole. This could not be a short-term profit-maximising choice for all firms in the market if each were able to increase output without other firms’ reacting, since in the absence of such reactions at least one firm and possibly all firms would find it profitable to deviate from the monopoly level.*”

²²³ (Wish, *Competition Law*, 2012) *op. cit.* page 562 “Economists have no particular interest in whether collusion is “tacit” or “explicit”: it is the effects of the collusion that matter”. The concept of explicit collusion is, therefore, simple: any express price fixing, quota distribution, market sharing, or client allocation agreement between competitors. The meaning of tacit collusion on the contrary is harder to grasp: oligopolistic behavior (contrasting with monopoly and perfect competition), in markets with high barriers to entry, by firms that interact strategically with the intention of influencing the future actions of their competitors. (Ivaldi, Rey, Seabright, Tirole, & Jullien, 2003) *op. cit.* Other authors prefer a different terminology such as (Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 2004), *op. cit.* page 735 distinguishing between “spoken” and “unspoken” agreements.

Professor Motta phrases the problem more clearly when he argues that, whereas in economic theory collusion is defined as market outcome (i.e., “high prices”), antitrust authorities and judges should consider as illegal only practices where firms explicitly coordinate their actions to achieve a collusive outcome.²²⁴

The reason for such a distinction is the importance of interdependence²²⁵ and the so-called “folk theorem”. According to economic theory, in infinite games there exists a plethora of equilibriums, including equilibriums that correspond to full cooperation, as long as the players are sufficiently patient.²²⁶

In other words, once competitors have the chance to repeat a game – with the knowledge gained in the previous game – the border between coordinated and non-coordinated behavior soon fades to become, ultimately, a very fuzzy line.²²⁷ So, distinguishing legal from illegal behavior in oligopolistic markets²²⁸ is a very hard job

²²⁴ (Motta, 2004) *op. cit.* page 138.

²²⁵ The path opened by Stigler, G. "The Economics of Information." *The Journal of Political Economy*, 1961: 213 - 225 and continued by Green, E., and R. Porter. "Noncooperative Collusive under Imperfect Price Information." 52 *Econometrica* no.1, 1984: 87 to 100, soon was overflowed by an amount of literature which is difficult to summarize. In the particular field of game theory an information sharing, the following articles provide a good summary of the literature, Carlton, D., R. Gertner, and A. Rosenfield. "Communication Among Competitors: Game Theory and Antitrust." *George Mason Law Review*, 1997, Gärtner, D., and C. Roux. "Banning Information Exchange to Fight Collusion? Bananas and Beyond." 2011. Mollgaard, P., and P. Overgaard. "Transparency and Competition Policy" *The Pros and Cons of Information Sharing*, 2006.

²²⁶ (Kaplow & Shapiro, Antitrust, 2007) *op. cit.*, (Motta, 2004) *op. cit.* page 140 “*The folk theorem says that in games with infinite horizon if the discount factor is large enough, firms can have any profit between zero and the fully collusive profit at the “collusive” equilibrium*” or (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.* pages 730 and 731 “*The Folk Theorem teaches that the equilibrium of the stage game – in this case, the set of Cournot quantities – also is an equilibrium of the infinitely repeated game (...) The Folk Theorem is sometimes very loosely paraphrased as “anything can happen”*”.

²²⁷ (Motta, 2004) *op. cit.* page 140. (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.* pages 779 and 780, for that reason he argues that Competition Authorities should focus in actions against self-interest as “the critical plus factor”.

²²⁸ One caution should be made even if it is too obvious: we are talking about oligopolies. As it is well-known, the opposite of a perfectly competitive market is a monopoly. In the ideal collusive scenario, the members will behave and determine the profit maximizing price just as monopolist would do. In order to do so, the perfect cartel would contain relatively few members who collectively account for 100% of the production in a relevant market. (Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, 1999) *op. cit.* page 145.

to do for Competition Authorities if all they have is market performance and market data.²²⁹ Particularly, knowing that there are markets (those similar to a Cournot model) where pricing above the industries marginal cost is not necessarily prove of collusion.²³⁰

Information exchanges serve as mechanism to bridge the gap between the legal and the economic approach to collusion. Because, economists believe that they can make predictions as to the possible uses of an information exchange and their impact on the market, they tell lawyers that they can make predictions as to the intentions behind their actions.²³¹ So if they spot an information exchange, they contend that the Authority should not wait for the result, because they can predict it. The uncertainty is evident.

In the following pages, we will explore **how** information exchanges facilitate collusion, **what** type of information exchanges can facilitate collusion and, lastly, **when** (under which circumstances) can these information exchanges do so?

B. The cons: how do information exchanges “facilitate” collusion?

Once we understand the concept of collusion, we can begin to understand how information exchanges facilitate reaching or sustaining a collusive outcome.²³² The answer throughout the literature is consistent: the primary way in which information sharing can harm consumers is by increasing transparency²³³ which, in turn, allows

²²⁹ This is explained very clearly by (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.* pages 779 and 780. He posits four main conclusions: (1) Something more than interdependence must be shown before an agreement (spoken or unspoken) can be inferred; (2) The existence of an agreement cannot be inferred from actions consistent with Nash, non-cooperative equilibrium in a one-shot game oligopoly model; (3) the existence of an agreement can be inferred from actions inconsistent with Nash, non-cooperative equilibrium in a one-shot game oligopoly model. Action contrary to self-interest is the critical “plus factor”. (4) The existence of an agreement should not be inferred absent some evidence of communication of some kind among the defendants through which an agreement could have been negotiated.

²³⁰ This is very clearly explained by (Bishop & Walker, The Economics of EC Competition Law: Concepts, Application and Measurement, 2010) *op. cit.*

²³¹ (Motta, 2004) *op. cit.* page 153.

²³² (Kaplow, An Economic Approach to Price Fixing, 2011) *op. cit.*

²³³ For a short but very insightful explanation, see OECD. "Unilateral Disclosure on Information with Anticompetitive Effects." Working Party No.3 on Co-operation and Enforcement, 2012, particularly, the

firms to (a) engage, and/or (b) sustain and effectively punish,²³⁴ and (c) and/or prevent potential competition to destabilize the equilibrium.²³⁵

In what follows, we explain how information exchanges facilitate collusion (coordinated behavior) in these three instances.

1. Focal point of coordination²³⁶

In order to maximize profits, cartel members need to behave as close as possible as a monopolist would do. The obvious difference is that a monopolist decides by himself what prices and outputs to sell, whereas cartel members must reach some type of consensus among the members. This might be very difficult depending on the members' cost structures, variety of products, etc. Information sharing can facilitate competitors reaching a point or points for coordination.

For example, by sharing of future (pricing or output) intentions directly and privately between themselves, competitors can point each other the level at which they want to be in the future, without much risk, because if they do not see their competitors following them they can change their strategy.²³⁷

background paper by Antonio Capobianco: "On the one hand, market transparency is perceived as a factor to be encouraged; after all, the ideal model of perfect competition is premised on demand-side and supply-side perfect information about the market. Increased knowledge of market conditions mostly benefits consumers, who can choose between competing products with a better understanding of the product characteristics; customers can also compare terms and conditions of the various offerings and freely choose the most suitable one for their needs. Enhanced transparency benefits consumers by lowering search costs (...) Increased transparency, on the other hand, is one of the factors required to reach a collusive understanding and make sure that it is sustainable over time. Transparency generally contributes to the ease of reaching an "agreement", and decreases incentives to cheat by reducing the time before cheating is detected. In order to reach terms of co-ordination, to monitor compliance with such terms and to effectively punish deviations, companies need to acquire detailed knowledge of competitors' pricing and/or output strategies. The artificial removal of the uncertainty about competitors' actions, which is at the basis of the competitive process, can in itself eliminate the normal competitive rivalry."

²³⁴ (Motta, 2004) *op. cit.* pages 150 to 156.

²³⁵ Bennet, M., and P. Collins. "The Law and Economics of Information Sharing: The Good, The Bad and The Ugly." *European Competition Journal*, 2010, page 320.

²³⁶ (Faull & Nikpay, 2014) *op. cit.*

²³⁷ (Bennet & Collins, 2010) *op. cit.* page 321. Also (Motta, 2004) *op. cit.* page 154. However, in our view, for this reasoning to be true, firms should have enough time to maneuver and change prices if they

As we will see later on, economists seem to argue that generally there will be no reasonable business explanation for such behavior other than collusion.²³⁸ Some economists and lawyers refer to it in broader terms as “strategic” information.²³⁹

These arguments are, nonetheless, controversial. In fact, a whole trend of the economic academic discussion on information exchanges has focused on this theory, labelled as the “cheap talk” doctrine or “cheap talk” critique.²⁴⁰

The general criticism towards this theory has been that, if firms could change their strategy at any time and the exchanges were made prior to any conduct on the market, those exchanges amounted to nothing else than “cheap talk”, absent any commitment by the firms.²⁴¹

The views on this debate are mixed.²⁴² For example, not even 10 years ago, some economists were of the opinion that the basic factors influencing the “ability to reach a collusive agreement” were, then, extremely poorly understood both theoretically and empirically so as to be able to provide solid evidence to support the

are not followed, which requires the tools to ascertain their competitors’ prices. That is not to say that sharing information does not lead to coordination but that it comes with certain risks for companies.

²³⁸ (Motta, 2004) *op. cit.* page 156 “To conclude, whereas announcements directed only to rivals should be forbidden, announcements about current and future prices which carry commitment value vis-à-vis consumers should be regarded as welfare enhancing”.

²³⁹ (Ghezzi & Maggiolino, 2014) *op. cit.*

²⁴⁰ As (Motta, 2004) *op. cit.* page 153 explains: “Announcement of future prices (or production plans) might help collusion, in that it might allow firms to better coordinate on a particular equilibrium among all the possible ones. Farrell (1987) was the first to show the role of non-binding and non-verifiable communication (known as “cheap talk”) in achieving coordination among players in games with multiple equilibria. Since then, both theory and experimental evidence seem to indicate that announcements about price intentions might help firms to coordinate, although not under all circumstances. However, not all announcements about future actions should be treated in the same way”.

²⁴¹ Pepperkorn, L. “Competition Policy Implications from Game Theory.” *Workshop on Recent Developments in the Design and Implementation of Competition Policy*. Florence, 1996. 1-18. arguing that the second implication arising from game theory as applied to competition law is that Competition Authorities should not worry about communication on future behavior. (Caffara & Kuhn, 2006) *op. cit.*

²⁴² See a very good explanation of the different views on cheap talk on (OECD, Unilateral Disclosure on Information with Anticompetitive Effects, 2012) *op. cit.* particularly, within the background paper by Antonio Capobianco, its para 2.3.2. “How valuable is “cheap talk”?”

idea that information exchanges facilitated the reaching of an agreement (as opposed to facilitate monitoring).²⁴³

However, in recent years, there has been a shift in academia. Former DG Comp, Chief Economist, professor Kühn has recently affirmed that: “since then, the idea that cheap talk communication about planned future conduct could be essential to achieving cooperation in coordination games has been strongly supported by experimental work on coordination games”.²⁴⁴

The classic text book example is the US case in the Airline Tariff Publishing Company (“ATP”).²⁴⁵ In December 1992, the US Department of Justice (DOJ) sued several U.S. airline companies and the ATP for a price fixing violation of Section 1 of the Sherman Act. The particularity of this case resided in the fact that carriers communicated price information but did not commit to a course of action. They could announce a future price increase but they left themselves open the option to change it before it took effect.²⁴⁶ Ultimately, the case was settled through consent decrees.²⁴⁷

²⁴³ (Caffara & Kuhn, 2006) *op. cit.*

²⁴⁴ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* (Overgaard & Mollgaard, 2007) *op. cit.*

²⁴⁵ United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994). Summarized very clearly in (OECD, Unilateral Disclosure on Information with Anticompetitive Effects, 2012) *op. cit.* background paper. For more details on the case, see US submission to the OECD Report on Oligopoly, 1999, Paris.

²⁴⁶ (Overgaard & Mollgaard, 2007) *op. cit.* page 15 “A suggestion to halt an unwanted discount fare could be made unilaterally by a firm by announcing a Last Ticket Day (LTD) for that fare. If other firms follow suit, they go ahead and implement it; if not, the LTD could be changed to a later date or eliminated. Since no trade is made based on the information, no sales are lost before coordination has been achieved. It is in this sense that “talk is cheap.” In addition, airlines could use a First Ticket Date (FTD) to signal that they suggest a new and higher price or they could threaten a cheater with a punishment strategy of low prices to take effect in the future, if the cheater does not bring prices back in line”. (OECD, Unilateral Disclosure on Information with Anticompetitive Effects, 2012) *op. cit.* background paper.

²⁴⁷ (Overgaard & Mollgaard, 2007) *op. cit.* page 15, the consent decrees stipulated the end of cheap talk: “By limiting the ability of the airlines to engage in extensive price negotiations, the government contends that the airlines will find it more difficult to co-ordinate on more collusive outcomes in the future. Whether the decree actually will have this effect remains to be seen, but as co-ordination becomes more costly, it seems unlikely that the airlines will be able to engage in extensive negotiations that link together dozens or hundreds of markets. Multimarket contact may still be present, but without the ability to easily define the terms of an agreement, firms may not be able to exploit their cross-market linkages as fully as before the entry of the consent decree.”

2. Internal stability of coordination²⁴⁸

Nevertheless, even if the companies can reach a consensus through information sharing, it would be still necessary that the industry meets certain conditions that ensure that the collusive equilibrium can be sustained. After all, there is no sense in reaching an agreement, if this cannot be enforced later on.

Stigler was one of the pioneers in analyzing collusion under this perspective.²⁴⁹ The idea behind his work was that the factors that deter collusion are those factors that make cheating (i.e. deviating from the collusive explicit or tacit meeting of the minds) worthwhile.²⁵⁰

a) *The economics of cheating in cartels*

To identify them, it is necessary to understand the economics of cheating in these collusive equilibriums. Even though a cartel wishes to behave like a single monopolist, there is a crucial element that differentiates them: the diffused effect of their actions.

In plain words, a cartel member obtains gains as a member of the cartel, but his gains are even higher, if he cheats while the cartel is in place.²⁵¹ Thus, the question is: when will a cartel member cheat?

²⁴⁸ (Faull & Nikpay, 2014) *op. cit.*

²⁴⁹ Stigler, G. "The Economic Effects of the Antitrust Laws." In *The Organization of Industry*, by G. Stigler. Chicago: The University of Chicago Press, 1983, page 268. "*when the event we wish to study is clandestine, we cannot rely upon direct observation. I believe that my theory of oligopoly is a useful tool for this study precisely because it seeks to isolate (...) the determinants of successful cheating and hence unsuccessful collusion*".

²⁵⁰ As (Motta, 2004) *op. cit.* page 150 puts it "*detection of deviation is a crucial ingredient for collusion*".

²⁵¹ Note that these incentives to cheat are observed in a perfect cartel with identical cost structures for all firms, intuition tells us that the incentives to cheat may increase if we add differentiation in the firm's marginal cost and marginal revenue structures. If firms set a collusive equilibrium, their marginal revenue will exceed their marginal cost, thus obtaining, supra-competitive profits. For the monopolist this is a stable situation, however, for each single cartel member there is an incentive to increase his output and decrease his prices (an incentive to cheat), as he will receive all the profits of the cheating behavior while the negative consequences will be borne by all the firms in the market.

Well, only when there is limited risk that he will be detected and punished. In other words, his behavior is only beneficial to him for as long as the other cartel members do not react. The moment the other members increase output, prices will decrease for all members; losing, therefore, their supra-competitive profits.²⁵²

**b) *Monitoring adherence to the collusive agreement
or practice***

As a result, we can see how information sharing can be a very useful mechanism for firms to monitor adherence to the collusive equilibrium.²⁵³

Precise individualized information might allow coordinating firms to identify which exact firm has deviated, on which particular product, and for how long.²⁵⁴ This makes it easier to tailor the punishment for any deviating behavior.²⁵⁵

In other words, even if competitors can reach an agreement and develop the tools to monitor compliance, it is undisputed that the incentive to cheat will be, ultimately, affected by the “punishment” that the cheater faces. In particular, there are two elements of the punishment which will normally determine the likelihood of

²⁵² This was Stigler’s intuition in 1964 when he argued that the likelihood of collusion could be determined by the ability of the members of the cartel to detect deviating behavior. Since then, it has been supported and expanded by a wealth of economic literature. Stigler, G. “A Theory of Oligopoly.” In *The Organization of Industry*, by G. Stigler. Chicago: The University of Chicago Press, 1983. Stigler suggested three empirical predictions: First, that oligopolistic collusion was more likely in markets with small buyers rather in markets with large buyers. The reason being that while the latter are price takers, the former can negotiate prices. Second, that collusion will be always more effective against buyers who report correctly and fully the prices tendered to them (such as the Government) as this would allow the cartel to monitor prices and thus deviation. Third, and following the previous prediction, collusion is severely limited (excluding market sharing) when the significant buyers change identity continuously. Summarizing it (Motta, 2004) *op. cit.* pages 150 to 156, fn 32. Particularly relevant are the conclusions of (Green & Porter, 1984) *op. cit.* that since observation and punishment are key to sustain the stability of a cartel, the observation of some period with low prices is not sufficient to exclude that the industry is at a collusive equilibrium. Rather, price wars simply are the indispensable element of a collusive strategy.

²⁵³ (Bennet & Collins, 2010) *op. cit.* page 322. (OECD, Unilateral Disclosure on Information with Anticompetitive Effects, 2012) *op. cit.* background paper, (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.*

²⁵⁴ (Bennet & Collins, 2010) *op. cit.* page 323.

²⁵⁵ (Motta, 2004) *op. cit.* page 151 “exchange of information on past prices and quantities (or of verifiable information on prices and quantities set in the current period) of individual facilitates collusion, as it allows to identify deviators and better target market punishments, which then become more effective and less costly for the punishing firms”.

cheating: (i) the response time it takes the cartelists to observe and react to the deviation and (ii) the severity and accuracy of the punishment.

The response time is critical, the longer it takes the cartelists to react, the more profits that the deviating firm will make.²⁵⁶ The severity of the punishment is also crucial and raises an interesting aspect of game theory. The other members of the cartel will want to send a clear message that any deviating behavior will be penalized and they want to ensure that the penalty is higher than the benefits obtained.

However, the cartel members will also “suffer” the consequences of any penalty unless they can take targeted punishments. In the absence of clearly targeted punishments, an interesting trade-off will take place between the willingness of the firms to penalize the cheater, on the one hand, and their own interests in reversing to the collusive equilibrium as soon as possible, on the other.²⁵⁷

An example that is often cited by economists is the Fatty Acids case.²⁵⁸ According to the Commission decision, the market leader initiated contacts with the

²⁵⁶In order for the punishment to take effect expeditiously, the cartelists need: (a) to detect the deviating behavior expeditiously; and (b) possess the necessary spare capacity or financial muscle to reduce prices and penalize the cheater quickly. (Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2010) *op. cit.* (Nitsche & Von Hinten-Reed, 2004) *op. cit.* explain that “*Information exchange about future and past prices and quantities may affect the ability and the cost of punishment. For example, if in a scheduled transport service collusion builds on a market sharing agreement, the announcement of a new schedule that would not be in line with the collusive arrangement could trigger a punishment response even before market entry (e.g. a price cut), this can make punishment very effective and therefore help stabilising a collusive arrangement. Information exchange may also help targeting the punishment schemes. In localised markets punishment can be targeted against the cheating party if sufficient information exists to determine who has cheated. This reduces the cost of punishing a “cheater” and so makes the threat of punishment more credible.*”

²⁵⁷ (Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2010) *op. cit.* (Nitsche & Von Hinten-Reed, 2004) *op. cit.*

²⁵⁸ Fatty Acids [1987] OJ L3/17. See Stroux, S. *US and EC Oligopoly Control*. The Hague: Kluwer Law International, 2004, for a summary of the discussion, page 149. Bissocoli, E. “Trade Associations and Information Exchange under US Antitrust Laws and EC Competition Law.” 23 *World Competition* 1, 2000. According to Capobianco, A. “Information Exchange.” *Common Market Law Review*, 2004 the first Commission decision on information exchanges. See (Pepperkorn, 1996) *op. cit.* arguing that “*a number of elements indicate that the Commission did not base itself on or was not aware of the apparent underlying non-cooperative prisoner's dilemma game setting of the case. The decision does not make clear that the main effect of up to date monitoring is that punishment becomes more effective while the incentive to free ride is reduced. The Commission also indicates that it considers it of importance whether the companies actually communicated on sharing the market or not, making it clear that such would not be considered as 'cheap talk'.*”

other two large producers which led to an information exchange agreement among these producers which covered firm data on yearly sales and future four-monthly reports about total sales.²⁵⁹ This information was used to discriminate the competitive strategies. In fact, customer switches between the three main competitors were labelled “stolen sales”, whereas gains of new customers were considered “legitimate gains”.²⁶⁰

3. External stability of coordinated outcomes²⁶¹

Moreover, information sharing may also be used to detect new entrants in the market and react coordinately against them.²⁶²

Information exchanges might increase transparency in such a way to deter new entrants in the market, if the firms which are present in the market can take actions to deter their entry. That could be the case for example in industries that require high investments for entry. If incumbent firms can decrease prices for a sufficiently long period of time to deter entry, then the potential company might be deterred from entering the market.

This was the theory of harm raised by the European Commission in the UK Tractor case.²⁶³ In this case, the European Commission forbade an information exchange agreement that, in its opinion, impeded any “hidden competition” to occur in the UK tractor market.²⁶⁴

²⁵⁹ (Stroux, 2004) *op. cit.*, (Faull & Nikpay, 2014) *op. cit.*, (Capobianco, 2004) *op. cit.*.

²⁶⁰ Nitsche, R., and N. Von Hinten-Reed. "Competitive Impacts of Information Exchange." *CRA*, 2004.

²⁶¹ (Faull & Nikpay, 2014) *op. cit.*

²⁶² (Faull & Nikpay, 2014) *op. cit.*

²⁶³ 92/157/EEC: Commission Decision of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/31.370 and 31.446 - (“UK Tractors”) Official Journal L 068, 19-33.

²⁶⁴ *UK Tractors* at 37. The Commission stated at the time: “*The Exchange restricts competition because it creates a degree of market transparency between the suppliers in a highly concentrated market which is likely to destroy what hidden competition there remains between the suppliers in that market on account of the risk and ease of exposure of independent competitive action. In this highly concentrated market, 'hidden competition' is essentially that element of uncertainty and secrecy between the main suppliers regarding market conditions without which none of them has the necessary scope of action to compete efficiently. Uncertainty and secrecy between suppliers is a vital element of competition in this kind of*

This case nicely illustrates one of the main legal concerns regarding information exchanges: there is a difference between forbidding collusion and forbidding those factors which might make a market more prone to coordinated behavior,²⁶⁵ even if that coordination might not necessarily be the direct result. Moreover, it already articulates what will be explained next: that the information exchanges can have procompetitive effects.

Phrasing it differently, it is very difficult to envision a functioning cartel without an information exchange between competitors; this does not mean, however, that all exchanges should form a cartel or that all exchanges or disclosures are done with this purpose. Sometimes, there might a legitimate business interest in disclosing or exchanging the information.

C. The pros: How can information exchanges improve the market?

So far, we have become acquainted with the concept of collusion. By now we understand how information exchanges, in markets with limited firms, can increase transparency and facilitate coordinated behavior. So the obvious question arises, why do not prohibit information exchanges among competitors once from all? The answer: not all information exchanges are dangerous, in fact, many are beneficial.

In a series of studies that started in the mid-nineties, the economists Kühn and Vives studied in depth the effects of information sharing in static markets (i.e. the

market. Indeed active competition in these market conditions becomes possible only if each competitor can keep its actions secret or even succeeds in misleading its rivals This reasoning, however, in no way undermines the positive competitive benefits of transparency in a competitive market characterized by many buyers and sellers. Where there is a low degree of concentration, market transparency can increase competition in so far as consumers benefit from choices made in full knowledge of what is on offer. It is emphasized that the United Kingdom tractor market is neither a low concentration market nor is the transparency in question in any way directed towards, or of benefit to, consumers."

²⁶⁵ (Pepperkorn, 1996) *op. cit.* page "In this decision the Commission more profoundly understood the apparent non-cooperative prisoner's dilemma game setting of the case. The emphasis on hidden competition and uncertainty about competitors actions, a shortened reaction lag, eliminating the advantage of a company that tries to undercut, making targeted punishment possible etc. all fit very well in such a game theoretical explanation. The analysis within the context of a concentrated market and the Commission conceding that information would only truly become historical when older than one year add to this."

Bertrand and Cournot models).²⁶⁶ Although the conclusions could not be fully extrapolated to the real world, their studies provided very helpful insight for understanding the unilateral firms' incentives to share information.

As it is well-known, Competition Authorities act *ex post* and have to infer the existence collusion from indirect evidence and past behavior. Understanding the situations where firms have an incentive to share information unilaterally was already a step forward for Competition Authorities to differentiate competitive from anticompetitive behavior.²⁶⁷

These economists concluded, by looking at static models, such as the Cournot model, that in many circumstances firms might have a unilateral incentive to provide information to their competitors. In other words, there might be instances where supplying the information "legitimately" benefits the discloser.²⁶⁸

The economic literature has identified at least four scenarios in which firms can derive pro-competitive benefits from information sharing.²⁶⁹

First, information sharing can allow companies to compare themselves against other firms (benchmarking). This can be beneficial if it promotes innovation or, for example, if competitors mirror each other's' best practices and enhance efficiency.

²⁶⁶ See the seminal study for the European Commission, Kühn, K., and X. Vives. *Information Exchanges among Firms and Their Impact on Competition*. Luxembourg: Office of the Official Publications of the European Communities, 1995.

²⁶⁷ (Kühn & Vives, 1995) *op. cit.* page 35.

²⁶⁸ By this we mean, that not necessarily because he expects that this could be interpreted by the competitor in such a way that he will react to coordinate tacitly with him. (Motta, 2004) *op. cit.* page 151, summarizes it in the following way "*the incentives for firms to exchange private information, and more importantly the welfare effects of such exchange are not robust, as they crucially depend on whether the firms compete on prices or quantities, or whether the uncertainty concerns costs or demand*". In other words, since firms may have incentives to share information for efficiency reasons, the welfare impact of information sharing practices is, in general, ambiguous. Vives, X. "Information Sharing: Economics and Antitrust." *IESE Occasional Paper*, 2007. According to Vives to reveal information unilaterally is a dominant strategy with either: (i) private values or (ii) common values with strategic complements, with the exception of Bertrand (price) competition with cost uncertainty; whereas not revealing is the dominant strategy with common values and strategic substitutes. He argues there is a large range of circumstances where pooling does raise profits, the exceptions being: (i) Bertrand (price) competition with cost uncertainty and (ii) Cournot (quantity) competition with a low degree of product differentiation or slowly rising marginal costs.

²⁶⁹ (Bennet & Collins, 2010) *op. cit.*

Some authors describe this benefit as “organizational learning” as information exchanges may lead to an improved distribution system and other improvements in productive efficiency, which ultimately benefit customers and consumers.²⁷⁰

This means, for instance, understanding how bottles can be designed with less plastic and still contain the same liquid, can homogenize a strategic cost but it certainly decreases it as well for our bottled water companies.²⁷¹

Second, information sharing can allow companies to understand better the market evolution and be better prepared for shifts in demand or supply. This might be particularly useful in markets where demand fluctuates significantly, where there is undergoing a significant technological change or where consumer tastes and preferences change rapidly. By pooling their information together, firms may be able to draft better business and investment plans for the future.²⁷²

Pooling information allows firms to better adjust to demand and cost shocks.²⁷³ Moreover, information exchange improves product positioning. In industries with product differentiation or spatial competition, coordination regarding the choice of location often is beneficial to consumers, who benefit from reduce transport cost, and increases total welfare. In addition, an information exchange may reduce sub-optimal production or pricing choices and, hence, reduce costs associated with excess inventories.²⁷⁴

²⁷⁰ (Nitsche & Von Hinten-Reed, 2004) *op. cit.* page 4.

²⁷¹ (Bennet & Collins, 2010) *op. cit.*

²⁷² (Nitsche & Von Hinten-Reed, 2004) *op. cit.* page 4. (Bennet & Collins, 2010) *op. cit.*

²⁷³ (Vives, 2007) *op. cit.* page 3. This will tend to improve welfare except in the case of a monopolist. Under cost uncertainty, more information may soften price competition. Moreover, information sharing can induce output uniformity across varieties. This effect is positive given the existence of consumer preference for variety. According to Vives, the output adjustment effect tends to dominate, and with monopolistic competition and demand uncertainty, information sharing increases (decreases) expected total surplus under Cournot (Bertrand) competition

²⁷⁴ (Nitsche & Von Hinten-Reed, 2004) *op. cit.* page 4.

Some economists are, even of the view, that an exchange of information on expected future demand (directly or indirectly) can rationalize production and thus lead to cost advantages.²⁷⁵ The Indian fishermen case is the classic example.²⁷⁶

As a result of the introduction of cell-phones in India, Jensen observed that instead of selling their fish at beach auctions, the fishermen would call around to find the best price. He found out that the fishermen who “risked” going beyond their local markets to sell their catches jumped from zero to around 35% as soon as coverage became available in a specific region. The result, according to his study, no fish were wasted and the variation in prices fell dramatically.²⁷⁷

Third, information sharing can also be important in choosing the right consumers and avoiding unnecessary costs for making the wrong choices.

For example, in the Asnef-Equifax case, financial institutions in Spain created a central organization for the exchange of information the creditworthiness of potential borrowers. According to the Authorities, this reduced the risk of lending because it abridges the asymmetry of information between the information available to the lenders and the information held by the potential borrowers. The theoretical benefit was that the information exchange would reduce the number of borrowers who defaulted on repayments, and hence improved the functioning of the credit supply system as a whole: solvent creditors would not have to bear the sins of insolvent ones.²⁷⁸

Fourth, information sharing may also be necessary as part of innovation agreements to develop “next generation” products. For example, in order to enable suppliers to design standard components and enable finished products to interconnect.

²⁷⁵ Doyle, M., and C. Snyder. "Information sharing and competition in the motor vehicle industry." *Journal of Political Economy*, 1999: 1326-64; (Caffara & Kuhn, 2006) *op. cit.* page 138.

²⁷⁶ Jensen, R. "The Digital Provide: Information (Technology), Market Performance, and Welfare in the South Indian Fisheries Sector." *The Quarterly Journal of Economics*, 2007, (Padilla, 2010) *op. cit.*

²⁷⁷ (To do with the price of fish: how do mobile phones promote economic growth, 2007) *op. cit.*

²⁷⁸ (Bennet & Collins, 2010) *op. cit.*, see ECJ preliminary reference in C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, S.L. v. Ausbanc* [2006] ECR I-11125.

For example, in an information industry where customers have a strong desire to avoid becoming locked-in and certain devices only allow buying the information from specific platforms,²⁷⁹ the competing suppliers of information may have an incentive to go beyond sharing their future R&D plans in order to respond to their customers' lock-in concerns.²⁸⁰

Think of the charging devices for cell-phones. As Padilla observes: "Competing suppliers will have an incentive to exchange their future R&D plans to ensure that their new products can mix and match. If that communication were limited by law, the innovation process would be thwarted and, to the extent that interoperability is made more difficult or imperfect, customers may have to pay higher prices over time".²⁸¹

D. The general conclusion: no conclusion beyond general guidelines as to their likely danger

So far into the study of the economics of information sharing, the reader will still have the impression that no conclusions have been reached: "*it seems that almost under any circumstances information exchange could be good or bad*".²⁸²

Precisely because of this reason - information exchanges among competitors may have both positive and negative effects - some economists have argued that the right approach should be assessing them always on a case by case basis.²⁸³ In other words, it should be advisable not to make any presumptions as to their positive or negative effects on competition ex-ante.

Others, on the contrary, argue this would place a high burden on firms, who may not be in a position to perform the complex economic analyses required, and on

²⁷⁹ (Padilla, 2010) *op. cit.*, see Commission Decision in the E-books case AT.39847 – E-BOOKS, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847

²⁸⁰ (Padilla, 2010) *op. cit.*.

²⁸¹ (Padilla, 2010) *op. cit.*.

²⁸² (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.*

²⁸³ (Padilla, 2010) *op. cit.*

Competition Authorities and private claimants bringing cases.²⁸⁴ That is why they believe it is sensitive to develop such presumptions.²⁸⁵

The economic literature is consistent in underscoring at least seven relevant parameters as helpful in designing policies on antitrust enforcement regarding information exchanges while, supposedly, ensuring an efficient allocation of resources.²⁸⁶

Those are: (i) type of behavior (*future or past behavior*), (ii) dissemination (*public or private information*), (iii) degree of commitment (*hard information or cheap talk*), (iv) nature of the information (*aggregated information or private information*); (v) age of the information (*new or old*);²⁸⁷ and (vi) frequency and trustiness (*many reliable contacts or just one “out of the blue” contact*).²⁸⁸

The following categorization summarizes, in our opinion, the mainstream views in the economic competition policy literature.²⁸⁹

²⁸⁴ (Bennet & Collins, 2010) *op. cit.* (Padilla, 2010) *op. cit.*.

²⁸⁵ Kühn, K.U. "Fighting Collusion: Regulation of Communication Between Firms." *Economic Policy*, 2001. (Padilla, 2010) *op. cit.*

²⁸⁶ (Faull & Nikpay, 2014) *op. cit.*

²⁸⁷ (Mollgaard & Overgaard, 2006) *op. cit.* page 123.

²⁸⁸ In their view, in many settings, repeated communication may be necessary to achieve credibility of the information or to make the information useful in facilitating cooperative pricing. (Carlton, Gertner, & Rosenfield, 1997) *op. cit.* page 432. These authors argue that in the absence of direct evidence of a naked cartel, the appropriate standard to judge information exchanges should be a rule of reason analysis. Following this literature, the European Commission on its Guidelines on Horizontal Cooperation Agreements distinguishes the following categories: strategic information, market coverage, aggregated or individualized data, age of data, frequency, public or non-public information and public or non-public information exchanges. (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) *op. cit.* paras. 86 to 94.

²⁸⁹ Following (Pepperkorn, 1996) (except for his views on cheap talk), (Vives, 2007) *op. cit.* and (Mollgaard & Overgaard, 2006) *op. cit.* page 124. A similar categorization (although more nuanced) can be found in (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* including information on investments and information on deliveries, pages 422 to 430. On the other hand, a more lenient position is taken by (Nitsche & Von Hinten-Reed, 2004) *op. cit.* , (Gärtner & Roux, 2011) *op. cit.* and, as explained above, (Padilla, 2010) *op. cit.* .

1. High risk

Private communications about future prices or production plans

There is strong consensus in the literature (save for some minor but very distinguished voices) that private strategic communications should always be interpreted as direct evidence for collusion.²⁹⁰ The reason is that there was no good efficiency argument to justify firms talking about their planned pricing conduct, while communication about future conduct is crucial in coordinating on a collusive outcome.²⁹¹

That is the case, particularly, for individualized future pricing or quantity intentions shared in private. In fact, economists do not shy away from labelling this type of information exchanges as object infringements (a legal concept we will explore later on in section J.5.c)).²⁹²

In the Cobelpa decision,²⁹³ the European Commission took the view that the only possible explanation for the exchange of private exchange of information concerning prices, discounts, price increases and reductions, rebates and general terms of sale, supply and payment was “*the desire to coordinate market strategies and to create conditions of competition diverging from normal market conditions, by replacing the risks of pricing competition by practical cooperation.*”²⁹⁴

According to the economic literature, exchanges on future prices significantly help firms coordinate on finding the right collusive agreement. In fact, from their

²⁹⁰ (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.*; (Ghezzi & Maggolino, 2014) *op. cit.*

²⁹¹ (Caffara & Kuhn, 2006) *op. cit.* page 139 and 140.

²⁹² (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* (Bennet & Collins, 2010) *op. cit.*

²⁹³ Commission Decision, *Cobelpa/VNP*, in O.J. 1977, L 242/10 see paras 27 to 30.

²⁹⁴ *Id.* at 29.

perspective it is, basically, the closest form to explicit collusion.²⁹⁵ They argue that since customers do not have access to such information, it involves little commitment so it is hard to see the “efficiency defence” for this type of information exchange.²⁹⁶

Some commentators argue that the same happens, for production information. In fact, they posit that it can actually be much more effective in achieving collusive outcomes since quantities are often easier to monitor.²⁹⁷

The European Commission Guidelines,²⁹⁸ following the mainstream economics, point out that: “exchanging information on companies’ individualized intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome.

Independent Schools²⁹⁹ is a good example of this type of exchanges. In this case, the OFT held that the exchange among schools about their changes in their future fees

²⁹⁵ The following sentence by Kühn is quite telling “*But in legal terms it may be useful to categorize them as illegal information exchanges because there may not be explicit agreements on behavior involved.*” In this regard, see already in 1974, the Glass Containers Decision, in O.J. 1974 I 160/1 at para. 43 “***It is contrary to the provisions of Article 85 (1) of the EEC Treaty for a producer to communicate to his competitors the essential elements of his price policy such as price lists, the discounts and terms of trade he applies, the rates and date of any change to them and the special exceptions he grants to specific customers. An undertaking which informs its competitors of such elements of its price policy will only do so when certain that, in accordance with the agreement entered into with such competitors in pursuance of the IFTRA rules, they will pursue a similar price policy for deliveries to the market where the undertaking is a price-leader. By such means the possibility of unforeseen or unforeseeable reactions by competitors is sought to be eliminated, thus removing a large element of the risk normally attaching to any individual action in the market.***”

²⁹⁶ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* page 422.

²⁹⁷ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* page 423. This is, however, controversial see (Padilla, 2010) *op. cit.*

²⁹⁸ (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) *op. cit.*

²⁹⁹ Office of Fair Trading, 20 November 2006, Decision n° CA98/05/2006, Exchange of information on future fees by certain independent fee-paying schools, Case CE/2890-03. This case is also analyzed by Reindl, A. “Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach.” 33 *Fordham International Law Journal* 4, 2011, who argues although the Office of Fair Trading’s (“OFT”) decision made no findings concerning the effects of the arrangement, there was apparently some evidence that the arrangement had resulted in higher tuition fees.

(privately and regularly) was anticompetitive. However, despite the evidence of an anticompetitive behavior,³⁰⁰ the OFT chose to pursue a "structured settlement".³⁰¹

Exchange of (private or public) disaggregated information about past prices and quantities

According to the economic theory, these exchanges also have a very significant potential to improve oligopolistic coordination and should be prohibited, especially if the information is hard and new. The ultimate reason is that this type of information can eliminate uncertainty about rival's conduct and allow punishment for deviation from the collusive outcome.³⁰²

In our view, Competition Authorities must undertake an overall assessment of all market circumstances in order to conclude whether there has been tacit collusion or not. Therefore, the concern towards past disaggregated information seems to have merit as long as we limit it to highly concentrated markets with few firms. That is tight oligopolies.

2. Medium risk

It seems that almost all scenarios would fall under this middle ground category which would require an application of the rule of reason analysis. The variety of

³⁰⁰ (Bennet & Collins, 2010) *op. cit.* According to them there were a number of features relevant to the assessment of the infringement as object: "*First, the information that was exchanged related to future intentions, and was confidential and not publicly available. Second, it was done on a regular and highly systematic basis, and for a number of years. Finally, the timing of the exchange corresponded with the timing in which school fees for the following year were set.*"

³⁰¹ Giles, M. "The OFT finds that an exchange of information on independent school fees violates national competition provisions." *e-Competitions*, 2007, (Bennet & Collins, 2010) *op. cit.* Under this settlement, the schools agreed to an admission of liability in return for each receiving a nominal financial penalty (no more than £10,000 in any one case) and collectively contributing to an independently monitored educational trust for students who might have been affected by the arrangements in question

³⁰² (Caffara & Kuhn, 2006) *op. cit.* page 142. As Kuhn points out there are two main reasons to expect disaggregation of information to help the firms in sustaining collusive agreements. First, it may be easier to detect defections from the collusive outcomes. Second, it may be easier to design punishment schemes that single out deviators. (Kuhn K., Fighting Collusion: Regulation of Communication Between Firms, 2001) *op. cit.* page 188.

different scenarios makes it almost impossible to provide a list. The following are just a few: sporadic information exchanges, information exchanges on delivery data, cost data or swap trades among competitors.³⁰³

Investments and market entry

Investment decisions are generally decisions with greater irreversibility than cheap talk communications. As a result, the general understanding is that the risk is therefore much lower because companies cannot back up in case of not being followed.³⁰⁴

At the same time, as we have seen, there are many potential efficiency effects. The South Indian Fisheries case discussed above is a good example. As Kühn summarizes it, on that case, entry into different local markets had a coordination benefit by avoiding excess supply in one market and insufficient supply in another.³⁰⁵

Public communications about future prices or production plans

According to economists, information about current demand can reduce demand uncertainty but it can never fully eliminate uncertainty about the rivals' past conduct.³⁰⁶ This, coupled with the output adjustment beneficial effect, also justifies a more lenient approach.³⁰⁷

³⁰³ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.*

³⁰⁴ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* he argues that the case of South Indian Fisheries discussed by Jensen (2007) *op. cit.* is a case in point in which entry into different local markets has a coordination benefit by avoiding excess supply in one market and insufficient supply in another. In his opinion, this shows that in case of investment and entry decisions the collusion is much less of a concern while avoidance costs can be quite large.

³⁰⁵ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.*

³⁰⁶ (Overgaard & Mollgaard, 2007) *op. cit.*

³⁰⁷ (Caffara & Kuhn, 2006) *op. cit.* page 142.

However, this is not always the case.³⁰⁸ A classic example is the one provided by Overgaard and Mollgaard about the cement industry in Denmark. In the early 1990s, the Danish Competition Authority found evidence of a lack of competition in the ready-mixed concrete industry. In particular, it was concerned that some buyers were paying too high prices because it was rumored that other customers received significant confidential discounts. Because at that time the Danish Competition Act emphasized the role of price transparency in promoting competition, the authority decided to gather and publish firm-specific transactions prices for two grades of ready-mixed concrete in three regions of Denmark. The intention was to inform buyers of bargain deals in the hope that this would lead buyers to exert stronger downward pressure on prices. Following the initial publication, however, average prices went up by 15 to 20 percent in less than six months. This compares with inflation of 1-2 percent per year and stable or decreasing costs of inputs.³⁰⁹

3. Low risk

Exchange of aggregated data

There seems to be an agreement that **exchange of aggregated and/or old data** is largely innocent, but care should be made to check the effective level of aggregation.

Following the three theories of harm underlined before, the understanding is that exchange of disaggregated information can facilitate punishments that are better targeted at deviators.³¹⁰ The logic behind this presumption is that highly disaggregated

³⁰⁸ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* See, the following example, borrowed from Kühn: “Suppose the CEO of a firm makes the following public statement at a news conference: “We believe that a price increase of 5% next year is realistic if the industry behaves more responsibly”. This is a statement that is about the behavior of the industry as a whole and how it should behave. There is no reason for a CEO to talk publicly about what the pricing behavior of other firms should be. Note that a rule that says that a CEO should not talk publicly about what competitors should do or what the “industry” should do would be the type of rule that would have strong incentive effects because it is clearly interpretable by firms. It is also hard to see why avoiding such statements would ever lead to inefficiencies.”

³⁰⁹ (Overgaard & Mollgaard, 2007) *op. cit.*

³¹⁰ (Caffara & Kuhn, 2006) *op. cit.* page 143.

exchanges are routinely adopted (when a cartel is set up) and that normally efficiency benefits can be obtained with aggregated data.

For example, in order to adequately design an investment plan, it might be useful for firm to gain information of current and expected demand in the industry. However, it is harder to see why it would need a breakdown by competitor to design its investment plan. Similarly, manager incentive schemes, that benchmark on changes in market share or performance relative to the market, do not require disaggregation by firm.³¹¹

This means that information exchanges about aggregated past information on non-strategic variables such as cost, which are shared in public should almost invariably be seen as not troubling. Indeed, some commentators have argued that “there is absolutely no evidence that exchanges of yearly demand and production data, aggregated over the whole industry, have any material impact on the ability to tacitly or explicitly collude”.³¹² Nonetheless, there are no clear safe harbors about them yet.³¹³

In this regard, the Horizontal Cooperation Guidelines point out that exchanges of genuinely aggregated data, that is to say, where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data. However, they caution that the possibility cannot be excluded that even the exchange of aggregated data may facilitate a collusive outcome in markets with specific characteristics. Namely, members of a very tight and stable oligopoly exchanging aggregated data who detect a market price below a certain level could automatically assume that someone has deviated from the collusive outcome and take market-wide retaliatory steps. In other words, in order to keep collusion stable, companies may not

³¹¹ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* .

³¹² (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.* .

³¹³ (Bennet & Collins, 2010) *op. cit.* page 332.

always need to know who deviated, it may be enough to learn that ‘someone’ deviated.³¹⁴ This comes back to the issue of the market structure already discussed.

From the case law of the European Courts, one could argue that exchanges of aggregated data should never fall under object category box.³¹⁵ In *Sarrió SA v. European Commission*,³¹⁶ the CFI annulled the part of the Commission’s decision prohibiting future exchanges of statistical data³¹⁷ between the companies involved arguing that the mere fact that a system “might be used” for anticompetitive purposes did not make it contrary to Article 85(1) of the Treaty, according to the Court, it was necessary to establish its actual anti-competitive effect.³¹⁸

Nonetheless, when the Commission reviewed the application for a negative clearance of the new exchange system, the Commission requested the system to be modifying because it took the view that in in particular cases the parties could identify individual participants from the analysis of the aggregated data.³¹⁹ That seems logical, for instance, when there were only two competitors in a particular market.

Exchange of old data

With regards to the age of data, economists agree that sharing information about current or past behavior is not as useful as information on future intentions, in order to reach a focal point of coordination in advance.

³¹⁴ (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) *op. cit.* para. 89.

³¹⁵ (Capobianco, 2004) *op. cit.* pages 1253 and seq.

³¹⁶ T-334/94, *Sarrió SA v. Commission* [1998] ECR II-1439.

³¹⁷ Cartonboard decision, O.J. 1994, L 243/1.

³¹⁸ T-334/94, *Sarrió SA v. Commission* [1998] ECR II-1439 paras. 278 to 280.

³¹⁹ (Capobianco, 2004) *op. cit.* page 1254 and Commission’s Notice pursuant to Art.19(3) of Regulation 17 (case No. IV/34.936/E1 – CEPI-Cartonboard), in O.J. 1996, C310/3.

However, they do not rule out that information sharing about current or past behavior might cause anticompetitive results when the company sharing the information is the price leader.³²⁰ In any event, it is not entirely clear if these could be considered collusive equilibriums.³²¹ Obviously, on intuition is evident: the older the data is, the harder it can be used to monitor the behavior of the companies in the market.

The Commission's Guidelines caution, however, that here is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry.³²²

E. When are information exchanges dangerous? The structural elements

Even if information sharing can have negative effects, the literature is consistent that these potential anti-competitive effects do not need to arise necessarily in all circumstances where there is an exchange of confidential information between firms. There are other factors that should be taken into account.

After all, there are many different factors that make a particular market more or less prone to collusion, transparency just being one of them.³²³

We do believe that the key one – the structure of the market - is somehow forgotten often in this mixed economic & policy literature concerning policy choices, as Professor Padilla brilliantly notes.³²⁴

³²⁰ (Bennet & Collins, 2010) page 322, *op. cit.* (Ivaldi, Jullien, Rey, Seabright, & Tirole, 2003) *op. cit.* and (Ivaldi, Rey, Seabright, Tirole, & Jullien, 2003) *op. cit.*

³²² (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) *op. cit.* para. 90.

³²³ Among others (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* “As far as information exchange on prices is concerned, we would think that factors meriting analysis would include market power, market (in)stability (evolution of market shares of suppliers exchanging information), maturity of the market, and customer bargaining power.”

Going against the grain, this economist has been clearly outspoken about this issue. In his view, sharing information on future behavior will not cause any harm if the affected market does not otherwise exhibit characteristics which make it amenable to collusion. He submits that the increase in market transparency may facilitate reaching a focal point and may also facilitate monitoring compliance with the tacitly co-ordinate outcome, but it does not guarantee in itself that such an outcome is internally and externally stable.³²⁵

The number of firms and market concentration is, therefore, probably the most important one when discussing tacit collusion and the utility of information exchanges.³²⁶ When the number of firms is large, coordinating on a common price and punishment strategy tends to be more difficult, cheating may be harder to detect and smaller firms may find cheating more attractive because they have more to gain relative to what they lose from punishment.³²⁷ Thus, in these cases, the modern recent economic theory is embracing the idea that only through an express agreement firms might be able to coordinate themselves, even though stability may be still hard to sustain. Obviously, the more firms the more difficult it is to monitor the market.

When there are only a few firms in the industry, however, the members of the cartel can more easily monitor each other's behavior. Thus, as the number of firms increase, so thus the number of two-way informational flows and it is harder to know who is cheating, even if it is clear that someone is cheating.³²⁸ That is why, as some authors argue, in most prosecuted cases the number of firms in the industry was low and concentration was high.³²⁹

³²⁴ (Padilla, 2010) *op. cit.* Explaining the importance of the structure see also (Wish, Information Agreements, 2006) *op. cit.*

³²⁵ (Padilla, 2010) *op. cit.*

³²⁶ Thus, as (Capobianco, 2004) *op. cit.* explains if there is not a concentrated structure, the burden of proof for the competition authorities is certainly high. "*If the market is fragmented, the authorities have to provide persuasive and credible evidence that despite the un-concentrated nature of the market there are other factors that are likely to give rise to tacit collusion*".

³²⁷ (Kaplow & Shapiro, Antitrust, 2007) *op. cit.*.

³²⁸ (Bishop & Walker, The Economics of EC Competition Law: Concepts, Application and Measurement, 2010) *op. cit.*.

³²⁹ (Kaplow, An Economic Approach to Price Fixing, 2011) *op. cit.*

Beyond the issue raised by the difficulty of reaching a consensus, there is another reason that makes it difficult to collude with too many competitors. Since firms must share the collusive profit, as the number of firms increases each firm gets a lower share of the pie. This has two implications. First, the gain from deviating increases for each firm since, by undercutting the collusive price, a firm can steal market shares from all its competitors; that is, having a smaller share each firm would gain more from capturing the entire market. Second, for each firm the long-term benefit of maintaining collusion is reduced, precisely because it gets a smaller share of the collusive profit. Thus the short-run gain from deviation increases, while at the same time the long-run benefit of maintaining collusion is reduced.³³⁰

Thus, for an information exchange to raise concerns, the market must be amenable to co-ordination in the first place.³³¹ The economic literature has pointed out

³³⁰ (Ivaldi, Rey, Seabright, Tirole, & Jullien, 2003) *op. cit.*

³³¹ The following are just an example of other relevant factors which have been identified by the general literature on collusion (that are, to some extent, dubious as to their impact on collusion) and that should be taken into account, in order to determine whether an information exchange is likely to result in collusion. See (Kaplow, An Economic Approach to Price Fixing, 2011) *op. cit.* (Motta, 2004) *op. cit.*, (Bishop & Walker, The Economics of EC Competition Law: Concepts, Application and Measurement, 2010) *op. cit.*

Capacity. As explained in the literature, capacity is a two-edge sword: a cheater may be able to grab more of the market if its capacity is larger but other firms may have greater ability to punish, assuming that the industry price can only be driven down if firms supply a sufficient quantity.

Asymmetries in capacity make collusion more difficult: a firm with substantially more excess capacity may gain much from cheating, whereas the others with limited additional capacity may find it difficult to impose punishment. As Motta puts it, generally speaking the role played by the presence of large levels of inventories and large excess capacity is ambiguous. On the one hand, large excess capacity implies that there is a stronger incentive to deviate (a price reduction would help fill capacity). On the other hand, if rivals are also endowed with large capacities, the punishment is more likely to be strong.

Product differentiation. Intuitively, the more different the products are, the harder to reach a consensus on quantities or prices. That is why some authors argue that most prosecuted cases involve homogenous products rather than differentiated products. According to them, when there is significant potential for differentiation, cheating is more likely because it may be more difficult to police product quality, subtle terms of sale, or other features. Moreover, when products are heterogeneous changes in market shares may reflect changes in consumer tastes or preferences rather than cheating. Nonetheless, some economists argue that product homogeneity does not unambiguously raise scope for collusion, given that the incentive to cheat in differentiated markets is smaller and even homogenous products can be seen as different by consumers thanks to marketing campaigns.

Symmetry. It can concern different dimensions (such as market shares, number of varieties in the product portfolio, costs and technological knowledge, capacities) whose importance will clearly differ across industries. Nonetheless, it is intuitive to think that people who are in a similar position would find it easier to arrive at an agreement that suits all of them.

that markets which are concentrated, stable and symmetric, and which involve homogeneous products are the most amenable to co-ordination.³³²

F. Information exchanges and market foreclosure

Finally, we believe we should pay a short visit to the other theory of harm aside from collusion: market foreclosure. The economic literature on information exchanges clearly shows that the traditional concern has been whether information exchanges might enable tacit collusion in markets whose “natural transparency” would not otherwise be sufficient to sustain collusion.³³³

In addition to this traditional approach, the Commission has warned about the possibility of additional theory harm: competitive foreclosure. The Guidelines differentiate two forms of foreclosure: (a) a competitive disadvantage if competitors

Symmetry in cost similarities. The economic logic dictates that if production costs are similar, the firms will reach more easily a coordinated price or output. In fact, greater similarity on virtually any dimension is helpful to oligopolistic firms seeking to sustain elevated prices as it facilitates reaching a collusive equilibrium that is equally or similarly beneficial to all of them.

Symmetry in temporal horizons. Similarly, the more similar the time horizons of the different firms are, the less chances that there will be any defections from the coordinated behavior. Firms with a shorter time-horizon might be less concerned about future penalties or price wars and more interested in obtaining the profit associated with defecting from the collusive equilibrium.

Elasticity of demand. The ease with which a consumer switches to outside producers as prices rise, is relevant in measuring the changes of coordinated behavior. In the extreme, if there is little or no ability for even a hypothetical monopolist to increase price, then an oligopoly will fare no better. However if there is some industry-wide market power, firms may well choose to elevate price. Where an industry is subject to unpredictable fluctuations in demand, it becomes more difficult for firms to determine, whether changes in the demand for their products reflect cheating on the part of one or more cartel members, or whether it simply represents a change in the overall level of industry demand. The requirement for firms to be able to monitor each other in a timely and efficient fashion has led economists to predict that coordination is likely to be much more difficult where demand is more volatile. Therefore, as the level of volatility increases, the level of prices which can be sustained under coordination, all other things being equal, decreases.

Moreover, the more chances that other firms have to supply the market, through entry or expansion by fringe firms, the less likely that coordination will be profitable in the first place.

However, some authors have pointed out that although elasticity of market demand is a factor that it is sometimes mentioned as facilitating collusion, it is not clear why it should affect the likelihood of collusion. If demand is very elastic, then a given price cut will determine a large increase in the quantity demanded, but this is true both for the price cut in a deviation and for the price cut in the punishment period. In other words, elasticity of demand will in general affect both sides of the incentive constraint for collusion, and its net effect on sustainability of collusion is ambiguous.

³³² (Ivaldi, Rey, Seabright, Tirole, & Jullien, 2003) *op. cit.* (Padilla, 2010) *op. cit.*

³³³ (Wagner-von Papp, 2012)

do not have access to information that others share and (b) the harm caused by competitors raising a price supplied to an undertaking competing downstream (increasing its costs).

However, these theories seem to have little backing in the economic literature. That is why we concur with Wagner-von Papp's opinion that these are not true information sharing theories of harm.³³⁴

Indeed, the first scenario is in reality a question of whether there is an anti-competitive refusal to deal rather than an issue of information exchange.³³⁵ Whereas, the second one focuses more on the specific result of the collusion – increase in prices for downstream competitors and its subsequent consequences – rather than in the fact that the exchange of information has decreased the uncertainty in the market and favored coordination.³³⁶

In our opinion, the Commission's theory of harm might make sense if it refers to the third theory of harm explained above, that is the maintenance of equilibriums which are infra-competitive, for example, by deterring entrance. Probably, the examples chosen by the Commission were not the most accurate ones.

G. Summary

After this incursion into the economics of information exchanges is time to make some final conclusions as to the lessons that we should take from a legal perspective.

First, information exchanges are a tool towards collusion. They are not an end but a means towards collusion. They facilitate collusion in three ways: (i) by helping competitors reach a point of coordination; (ii) by helping competitors monitor and

³³⁴ We believe that these theories of harm should be differentiated from those where the behavior allows monitoring maverick firms and increases barrier to entry (*UK Tractors*) which is a different theory of harm as we have seen above: sustaining external stability.

³³⁵ (Wagner-von Papp, 2012) *op. cit.*

³³⁶ (Wagner-von Papp, 2012) *op. cit.* “It is a secondary consideration what the object of this collusion is. Whether it be raising prices for consumers generally, raising prices only towards competitors on downstream markets, reducing output, abolishing or reducing rebates, coordinating marketing strategies or store hours, the list of parameters on which collusion is possible is as open-ended as the list of parameters on which competition is possible.”

punish quickly and efficiently those firms that separate from the collusive equilibrium; (iii) by ensuring the external stability of the infra-competitive equilibrium.³³⁷

Second, from an economic perspective there is a difference between explicit collusion (the classic cartel agreement) and tacit collusion (coordinated behavior through strategic actions without an express previous agreement). However, the exact frontier between tacit collusion, conscious parallelism and unilateral strategic behavior in tight oligopolies is very difficult to be drawn.³³⁸

Third, information exchanges can take place both in cases of explicit collusion and in cases of tacit collusion. In the first type of cases, the information exchange will be a tool in order to implement the agreement, in the second one, information exchanges will help reach, sustain or punish tacitly coordinated behavior, but, most importantly, will help authorities make inferences about the reasons why the market is not working as competitively as it would be expected. Indeed, if the Authorities can reach the conclusion that there is no legitimate business rationale for the disclosure of the information, they might have a link between the market situation and a possible (anticompetitive) behavior of the firms.³³⁹

Fourth, economists have tried to bring their theories into practical use by providing guidance as to policy guidelines for the Competition Authorities to use when investigating information exchanges among competitors. The key idea is that only information exchanges between competitors regarding future prices or output should always be considered, ex ante and absent proof on the contrary, as anticompetitive.³⁴⁰

The rest of possible information exchanges should be looked with suspicion but subject to a case by case analysis. These policy prescriptions, in our opinion, sometimes forget the relevance of other exogenous factors that might make a market prone to

³³⁷ Flochel, L. "Les échanges d'informations point de vue de l'économiste." *Concurrences*, 2011.

³³⁸ (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.*

³³⁹ (Capobianco, 2004) *op. cit.*

³⁴⁰ (Kühn K. , Designing Competition Policy Towards Information Exchanges - Looking Beyond The Possibility Results, 2010) *op. cit.*

collusion: such as market structures, demand stability, firms' and products' similarities, etc.³⁴¹

In other words, sometimes they lose focus by paying too much attention to the competitors' intentions rather than on suitability of the behavior to harm competition. One important thing to bear in mind, from a legal practitioner's perspective, is that economist models, games, theories always rest on the assumption of rational behavior. However, lawyers know that their clients sometimes are, to put it simply, foolish in their actions (even if that is very hard for economists to believe).

Fifth, economists are concerned with market equilibriums and the causes behind them. Their concept of collusion gives less importance to the subjective intent behind the firms' actions and more to the mechanism to improve their functioning. However, as lawyers we firmly believe that one can only (and should only) be sanctioned for those actions that are committed willfully or, at the very least, grossly negligently. The contrary will bring us to a system of objective responsibility.³⁴²

Sixth, the economic literature is not concerned, therefore, with key legal concepts such as the nature of values which are protected through legal norms, the different degrees to commit a sanction (i.e. the difference between committing a crime and attempting to do so) or the dissimilarity between prohibiting a behavior and sanctioning it, we should keep that in mind.

³⁴¹ (Padilla, 2010) *op. cit.*

³⁴² (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.*

V. INFORMATION EXCHANGES: ITS DIFFICULT FITTING WITHIN THE TRADITIONAL CATEGORIES OF ARTICLE 101 TFEU

Now it is time to bend the amalgam of economic papers and theories into the legal functioning of Article 101 TFEU.

As it is well-known, even though the list of infringements contained in Article 101 TFEU is non-exhaustive³⁴³ [i.e. not every conduct needs to fall within the five categories provided in subparagraphs a) to e)], according to the ECJ case law, the European Commission is – nonetheless – bound by the linguistic limits of Treaty.

This means, in turn, that before finding an infringement of competition law, the European Commission (or any Competition Authority applying this Article) needs to undertake a three-prong test.³⁴⁴

First, any non-listed infringement needs to be conceptualized either as an *agreement*, a *decision* or a *concerted practice*.³⁴⁵

Thus, in principle, the general view is that under the logic of Article 101 TFEU, unilateral behavior cannot be sanctioned since there can be no collusion arising of the conduct of only one competitor.³⁴⁶

³⁴³ Article 101.1 TFEU reads: “*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*”

³⁴⁴ This linguistic deconstruction of Article 101 TFEU has been the traditional approach used by scholars to disentangle this provision, see (Bellamy & Child, 2008) *op. cit.*, (Wish, Competition Law, 2012) *op. cit.* or (Faull & Nikpay, 2014) *op. cit.* among others.

³⁴⁵ (Wish, Competition Law, 2012) *op. cit.* page 82 and seq.

³⁴⁶ In the sense that one cannot agree with itself, for concertation there needs to be two concerting, there will be no association if there is only one member. See (Faull & Nikpay, 2014) *op. cit.*.

Secondly, once the conduct has been defined as an agreement, concerted practice or a decision (or a mix of them), the Competition Authority must look at its *effects* (real or potential) or at its *object*, to determine whether it infringed competition law. This is an alternative test, an Authority will only need to prove one or the other.³⁴⁷

Thirdly, the conduct must “*prevent, restrict or distort*” competition in order to infringe Article 101 TFEU.³⁴⁸ We submit that the distinction between the second and the third limbs of the analysis is more theoretical than practical, but it helps us illustrate an important aspect of Article 101 TFEU: its scope of application.³⁴⁹

As we will see this method of interpretation is very flawed, when applying Article 101 TFEU as a sanctioning provision, as it forces the interpreter of Article 101 TFEU, to extract from a dispersed system of sources (mostly soft law) a body of clear

³⁴⁷ Following the *Consten* ruling.

³⁴⁸ On this regard, see (Reindl, 2011) *op. cit.* “Article 101 TFEU has only one concept of “restriction of competition,” regardless of whether the analysis is built around a “restriction by object” theory or its regulatory equivalent, the categorization as a “hardcore” restraint, or a “restriction by effect” theory. A “restriction by object” analysis or “hardcore” categorization must reflect the same economic concepts as a fuller analysis of the facts of a specific case. Firms can anticompetitively increase market power either directly, through an arrangement that facilitates coordination and reduces competition among rivals, or indirectly, by foreclosing rivals from the market. There are no other alternatives; explanations of why a restraint violates article 101(1) TFEU must fit into one of the two theories”

³⁴⁹ See (Kühn & Vives, 1995) *op. cit.* “An information agreement between firms violates Art 85(1) only if it can be shown that the object or effect of the agreement is to significantly “restrict competition”. The term “restriction of competition” is not a well-defined economic (or legal) concept and therefore it has to be given meaning in practice with a view to the purpose of the underlying legal norm. There are two ways of filling this concept with meaning from an economic point of view. A natural definition of “restriction of competition” would be “any action that would have as an effect the reduction of social welfare (or consumer welfare)”. Unfortunately, for the reasons expounded in the report, the full welfare analysis required in every case for the industry in question is generally infeasible. Such a definition would therefore remain of a purely theoretical nature, a mere reference point, that would rarely be applicable. A more practical definition of “restriction of competition” would be “any activity that significantly increases the scope for collusive behaviour”. This would be based on the implicit belief that collusive behaviour would be likely to occur whenever there is significant scope for it. Such a definition would still allow us to think of “restriction of competition” as actions that are likely to reduce welfare. Such a definition also appears to virtually coincide with the recent European Court of Justice interpretation of Article 85(1) as explained in the *Tractor Exchange* case. There the Court stated: “...Article 85(1) of the Treaty prohibits both actual anticompetitive effects and purely potential effects, provided that they are sufficiently appreciable...”. Note that this statement, even though it nicely illustrates the issue of the frontiers of protection, was made prior of the entry into force of Regulation 1/2003, therefore, under a very different legal regime.

rules which it has to incorporate, afterwards, into the supposed categories of Article 101 TFEU, which is nothing more than a carefully open provision.

These limitations become particularly evident when one confronts Article 101 TFEU to a borderline infringement such as information exchanges. In fact, it is the major reason why the Commission (with the ECJ's blessing) has developed such an obtuse definition of concertation.³⁵⁰

H. The historical evolution of information exchanges under the Commission's Notices and Guidelines

Article 101 TFEU does not include information exchanges between competitors among the (non-exhaustive) list contained in its first paragraph, the law, therefore, on this infringement must be found therefore in the Commission's decision and its review by the European Courts.³⁵¹

In 1968, in its Notice on Cooperation Agreements, the European Commission described various types of agreement which could be regarded as beneficial and unlikely to infringe Article 101(1).³⁵²

The list included, among others, those whose sole object was an exchange of opinion or experience, joint market research, the joint carrying out of comparative studies of enterprises or industries and the joint preparation of statistics and calculation models. The Commission considered that these exchanges were not objectionable, if they simply enabled firms to determine their future marketing behavior freely.³⁵³

³⁵⁰ In Canaris's terms, we could say that this chapter demonstrates the teleological contradictions that exist in the competition law universe, that result from confusing the principle and the general clause with the detailed rules and the topics of its application to possible lacunae. (Canaris, 1999) *op. cit.*

³⁵¹ (Capobianco, 2004) *op. cit.* for an outstanding analysis of the Commission's practice up to 2004.

³⁵² Notice on Cooperation Agreements, O.J. 1968, C 75/3 (29.07.1968) « *Communication relative aux accords, décisions et pratiques concertées concernant la coopération entre entreprises* ».

³⁵³ (Wish, Information Agreements, 2006) *op. cit.* (Capobianco, 2004) *op. cit.*. According to the Notice: "agreements whose sole purpose is the joint procurement of information which the various enterprises need to determine their future market behavior freely and independently, or the use by each of the enterprises of a joint advisory body, do not have as their object or effect the restriction of competition".

Nonetheless, the Notice did warn that it would watch to ensure that these types of agreements did not lead to a restraint of competition. For the first time, the Commission specifically remarked that competition could be restrained by exchanges of information in an oligopolistic market for homogeneous products.³⁵⁴

The Commission further detailed its policy on information exchanges in 1977,³⁵⁵ after a series of decisions on individual cases, and along the lines of the ECJ judgment in the *Suiker Unie* case³⁵⁶ which will be discussed later on.

In its 1977 policy statement, the Commission listed three key criteria it would follow when reviewing such exchanges: (i) the structure of the market, (ii) the nature and scope of the information exchanged, and (iii) whether the exchange of information was of a private or public nature.³⁵⁷

However, it was not until the early 1990s, in the UK Agricultural Tractor case,³⁵⁸ as we will see later on, that the Commission made a comprehensive analysis of the potential restrictive effects of information exchange systems.³⁵⁹

The 1968 Notice was not replaced until 2001 with Commission's Guidelines on Horizontal Cooperation Agreements. Since these Guidelines did not deal with information agreements at all, the majority view was that the policy indications of the 1968 Notice, regarding information exchanges, remained valid.³⁶⁰

³⁵⁴ (Wish, Information Agreements, 2006) *op. cit.*

³⁵⁵ European Commission, 7TH Report on Competition Policy (1977) para. 5 and seq. available at http://ec.europa.eu/competition/publications/annual_report/ar_1977_en.pdf

³⁵⁶ (Capobianco, 2004) *op. cit.*. C 40/73, *Suiker Unie and others v. Commission* [1975] ECR 1663 ("**Suiker Unie**").

³⁵⁷ 7TH Report on Competition Policy, *op. cit.* (Capobianco, 2004) *op. cit.*

³⁵⁸ Commission decision, *UK Agricultural Tractor Exchange*, O.J. 1992 L 68/19.

³⁵⁹ (Capobianco, 2004) *op. cit.*

³⁶⁰ (Wish, Information Agreements, 2006) *op. cit.*, (Bellamy & Child, 2008) *op. cit.*, Ortega, A. "Object Analysis in Information Exchange Among Competitors." *Global Antitrust Review*, 2012.

The first more elaborate guidance on black letter law came surprisingly in 2008 in the Commission Guidelines on the application of Article 81 of the EC Treaty to maritime transport service.³⁶¹

The Maritime Guidelines set out that an exchange of information, in its own right, **might constitute an infringement of Article 81 of the Treaty by reason of its effect**. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted.³⁶² According to the Guidelines, the review should be done on a case by case basis and two key elements should be taken into account, the nature of the market and the information exchanges.³⁶³

However, around the same time, in its submission to the OECD on the Roundtable on facilitating practices, the European Commission stated that in EC competition law enforcement the evaluation of facilitating practices" took place mainly in the context of cases involving hard core infringements, even though interventions against "stand alone" practices of similar nature were "*also possible*".³⁶⁴

Thus, in 2008, the Commission seemed to be of the view that self-standing information exchanges were relative minor in comparison with information exchanges as plus factors in cartel cases. The European Commission was differentiating, therefore, between two broad categories of facilitating practices: (a) those which are

³⁶¹ [2008] OJ C 245/2 [38] – [59].

³⁶² Guidelines on the application of Article 81 of the EC Treaty to maritime transport services Official Journal of September 26, 2008 (2008/C 245/02), para. 41 and seq.

³⁶³ (Commission, Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, 2008): "*It follows that the actual or potential effects of an information exchange must be considered on a case-by-case basis as the results of the assessment depend on a combination of factors, each specific to an individual case. The structure of the market where the exchange takes place and the characteristics of the information exchange, are two key elements that the Commission examines when assessing an information exchange. The assessment must consider the actual or potential effects of the information exchange compared to the competitive situation that would result in the absence of the information exchange agreement.*"

³⁶⁴ European Commission, "Facilitating Practices in Oligopolies." OECD DAF/COMP(2008)24, 2008.

infringements on themselves (“self-standing” or “pure”), and (b) those which are plus factors in proving the existence of hard-core infringement.³⁶⁵

Moreover, the Commission clarified that only the latter could fall under the object category.³⁶⁶ The Commission seemed to rule out, therefore, that information exchanges as self-standing infringements could amount to infringements by object.³⁶⁷

According to the Commission’s submission, information exchanges as infringements by object seemed to be left only for those cases where they were plus factors in a cartel case.³⁶⁸ As we will see later on this trend shifted with *T-Mobile*³⁶⁹ and the 2011 Guidelines.

³⁶⁵ See the explanation provided by (Wish, Competition Law, 2012) *op. cit.* page 540 who differentiates between **information exchange in support of a horizontal cooperation agreement** and provides the *Gas Insulated Switchgear* [Commission decision of 24 January 2007, substantially upheld on appeal Cases T-117/07 Areva v. Commission [2001] ECR II-000] and agreement and/or concerted practice to exchange information and refers to the *Asnef-Equifax* case as an example, see *supra* note 278.

³⁶⁶ (OECD, Roundtable on Facilitating Practices in Oligopolies (DAF/COMP/2008(24)), 2008) *op. cit.* According to the Commission: “*In the Commission's enforcement practice pure facilitating practices such as information sharing (which do not have as their object to restrict or eliminate competition) are not regarded as “per se” type of infringements.*”

³⁶⁷ (OECD, Roundtable on Facilitating Practices in Oligopolies (DAF/COMP/2008(24)), 2008) *op. cit.* page 128. “*EC law requires thus an examination of the effects of information sharing practices. This assessment is not limited to actual effects alone, but must also take account of the potential effects of the agreement or practice in question on competition within the common market.*”

Note that the UK made a different reading of John Deere considering it almost as an infringement by object. “*it should not be thought that facilitating practices should always be subject to rule of reason analysis and detailed examination should be done in relation to the restrictive effect on competition in every case. For instance, if there are factors such as transparency, entry barriers, stagnant demand, and stagnancy in technology in an oligopolistic market that witnessed cartels in the past, information exchange agreements may not be allowed without a detailed analysis in terms of restrictive effects on competition. In this framework, the approach in the UK Tractors Decision of the European Commission, which was approved by CFI and ECJ, is thought to be correct.*”

³⁶⁸ *Id.* “*Indeed, in most cases, exchanges of information are used either to make the cartel possible (exchange of planned price increases, exchange of production or sales volumes in order to put in place a market sharing arrangement, exchange of information on the identity of customers in order to put in place a customer sharing arrangement) or to monitor the cartel (information exchanged in order to check the proper implementation of a commonly agreed price increase or production/sales quotas). It concretely means that such exchanges of information will be seen as an infringement of Article 81(1) EC by object, along with the other practices that form the cartel.*”

³⁶⁹ *T-Mobile*, *op. cit. supra* at footnote 214.

Given the absence of a clear general approach, on 14 January 2011, the Commission published its Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements which included a separate chapter on information exchanges.³⁷⁰

Commission officials justified this separate chapter on several grounds: a large demand from stakeholders, the fact that most cases take place at the national level and there was a need to ensure consistency among National Competition Authorities, the sense that the case law of the ECJ was not providing enough signals and, ultimately, the policy choice - given the difficulty to prove collusion in Court - to prevent it *ex ante*.³⁷¹

The Commission Guidelines changed slightly the discourse. According to the Commission, information exchanges can - on themselves - constitute a cartel³⁷² depending on the type of information exchanged, without the need to provide further evidence.³⁷³

³⁷⁰ (Ortega, 2012) *op. cit.*

³⁷¹ Ossowska, A. "Chapter on Information Exchange in the EC guidelines." *Cyprus Conference, 2010*. The last goal seems difficult to believe as it would have required setting up clear-cut safe harbors which has not happened.

³⁷² (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) *op. cit.* "information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel."

Particularly critical with this development see (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* "In its Guidelines on Maritime Transport of 2008, 166 the Commission noted that an information exchange, in its own rights, might constitute an infringement of Article 81 of the Treaty by reason of its effects. Nowhere did the Commission refer to any infringement 'by object'. Given that presumptions are to be based on common experience, it is legitimate to ask what experience the Commission gained between 2008 and 2010, which allows it to presume now that any exchange of future prices is anticompetitive 'by object'. In the Horizontal Guidelines, the Commission has not called attention to any relevant developments, and we can only note that disagreements on the effects of information exchanges among."

³⁷³ (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) *op. cit.* para. 74. "Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding

The Commission's Guidelines essentially argue that information exchanges can adopt all the possible categories of Article 101 TFEU but do not clarify whether and, under what circumstances, a line can be drawn between information exchanges on future prices which are part of the cartel and information exchanges that constitute the cartel on themselves, or whether information exchanges can constitute an infringement by object without being cartel, or, for the same matter, whether information exchanges on future prices can be a cartel and a concerted practice³⁷⁴

In what follows, we will analyze information exchanges under this traditional approach to Article 101 TFEU. This means as “agreements or concerted practices” and as “infringements by object or by effect”. We will soon see the evident problems with trying to encapsulate the complex economic reality within this system.

I. Information exchanges as self-standing agreements: a “*rara avis*”

1. The meaning of agreement under the case law of the European Courts: why should it be quite rare that self-standing information exchange agreements amount to a finable anticompetitive infringement

According to the Commission's Guidelines, theoretically, information exchanges can be categorized as a concerted practice or as an agreement. Even though it is true that there have been cases such as *UK Tractors*³⁷⁵ or *Asnef-Equifax*³⁷⁶ where

future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfill the conditions of Article 101(3)."

³⁷⁴ This evolution might be explained by the importance that indirect evidence has gained in showing hard-core cartels. As the Commission acknowledged in its submission to the OECD, given the increased awareness in the European business circles of the scope of EU competition law, jointly with the increased use of modern communications, it has become more difficult to discover direct documentary evidence and the use of indirect evidence has become indispensable. European Commission, “Prosecuting Cartels without Direct Evidence”, OECD DAF/COMP/GF (2006) 7. 2006, page 117. Of course, the optimists could say the opposite; there is less evidence because there are fewer cartels, due to the Authorities' good work.

³⁷⁵ Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, hereinafter “**UK Tractors Judgment**”.

³⁷⁶ C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, S.L. v. Ausbanc* [2006] ECR I-11125, hereinafter “**Asnef-Equifax**”.

the information exchange took place within an agreement between competitors, in our opinion, it seems quite difficult that Competition Authorities will fine an information exchange agreement - as a self-standing infringement – unless it is a cartel case.³⁷⁷

There are three reasons that justify our approach.

The first one relates to the relevance of the psychological element in the definition of agreement under the case law of the ECJ. As it is well-known, for an agreement to exist it is sufficient if the undertakings in questions should have expressed their joint intention to conduct themselves on the market in a specific way.³⁷⁸

In *Bayer*, the General Court reviewed the case law on the meaning of agreement and stated that the concept is slightly different between positing that an agreement “*centers around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention*”.³⁷⁹

Following this definition, it becomes evident that the intention or “purpose”³⁸⁰ of the parties is an important element in determining the concurrence of wills,³⁸¹ which is something different from the fact that infringements can be committed both negligently and willfully.

In our opinion, given the state of competition awareness nowadays, it seems very unlikely to have a self-standing information exchange agreement that is anticompetitive by object which it is not a secret hard-core cartel case.

³⁷⁷ Similarly, (Ortega, 2012) *op. cit.* and Meyring, B. “T-Mobile: Further confusion on information exchanges between competitors.” *Journal of European Competition Law & Practice*, 2010: 30 - 32.

³⁷⁸ T-7/89, *SA Hercules Chemicals v. Commission* [1991] ECR II-1711, para. 2 and (Faull & Nikpay, 2014), *op. cit.*

³⁷⁹ Case T-41/96, *Bayer v. Commission*, [2000] ECR II-3383.

³⁸⁰ We prefer not employing the term “object”, even though the Court uses this term, to avoid any confusion between the concepts of infringements by object or by effect.

³⁸¹ Unless one can argue that the concept of agreement for vertical relationships (such as the Bayer case) differs from the concept for horizontal relationships. In this regard, Lianos, I. “Collusion in Vertical Relations Under Article 81 EC.” 45 *Common Market Law Review*, 2008.

In other words, competitors will not manifest their joint intentions in the clear way that an “agreement” requires unless they are convinced of the procompetitive effects of their conduct, which, in turn, means that if declared anticompetitive the agreement will be declared so under an “effects based” approach.³⁸²

The second one relates to the fact that after Regulation 1/2003, firms can not submit, any longer, their agreements for clearance by the European Commission, so the ex-ante analysis by firms (or their advisors) will (and should) normally be very cautious. Therefore, unless the procompetitive effects are quite clear, competitors will not embark in any agreements that can be any close of a cartel, which reinforces the first conclusion.

The third one has to do with the very wide meaning and considerably lower burden of proof attached to the term concerted practices. As we will see, the flexible boundaries of this concept will make a much more attractive category than the more rigid “agreement” box, as the *T-Mobile* and *Bananas* case illustrate. This provides a prosecutorial bias in favor of this labelling.³⁸³

2. Information exchange agreements as anticompetitive infringements: UK Tractors, Asnef-Equifax and some recent national decisions

To our knowledge, the UK Tractor Exchange case is the only case - challenged before the European Courts - where the Commission banned an *agreement* to exchange information as a self-standing infringement (and not a cartel),³⁸⁴ on the basis that it was likely to hinder hidden competition and increase barriers to the entry.³⁸⁵

³⁸² One can broadly divide controversial cases on pure information exchanges into two categories. In the first category, it is often uncontroversial that there is an agreement to exchange information, but the undertakings claim that the information exchanged is not capable of restricting competition, or that any restriction of competition is outweighed by efficiencies under Article 101(3) TFEU. The prototypes for this category are cases such as *John Deere* and *Asnef-Equifax*. (Wagner-von Papp, 2012) *op. cit.*

³⁸³ Gebrandy, A. "Cases Note on Case C-8/08, T-Mobile Netherlands." 47 *Common Market Law Review*, 2010: 1199-1220, pointing out that the ECJ placed more emphasis on the nature of the concerted practice, as relating to an exchange of information than the referring court does.

³⁸⁴ In the remaining cases the Commission has concluded that the behavior constituted a concerted practice. Earlier Commission Decisions which were not challenged before the Courts are dealt in (Capobianco, 2004) *op. cit.*

The UK Agricultural Tractor Registration case³⁸⁶ was considered during a long time the leading case on the exchange of information between competitors. The decision condemned as incompatible with Article 101 a complex system for the exchange of information between tractor manufacturers in the UK that had been submitted for clearance under the pre-regulation 1/2003 system. The Commission's decision was appealed to the CFI and the ECJ and upheld by the Courts in full.

The Commission's decision concerned the exchange of information on individualized sales and market shares which the Commission found to amount to a restriction by effect. The Commission's conclusion relied in the following 4 main findings³⁸⁷:

First, the market was very concentrated with absence of competitive pressure from competitors outside the exchange (national market, absence of countervailing buyer power on the demand side, multimarket contacts and high barriers to entry. Second, the fact that the information was "commercially sensitive"³⁸⁸ and it was barely aggregated. Thirdly, the direct and frequent contacts between competitors.

³⁸⁵ In Spain, the Spanish Competition Tribunal did ban a similar fact scenario in beer suppliers case (Expte. A. 329/02, *Estadísticas Cerveceros*). Both cases dealt with notifications to the Competition Authorities rather than ex post investigations.

³⁸⁶ 92/157/EEC: Commission Decision of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/31.370 and 31.446 - (UK Agricultural Tractor Registration Exchange) OJ L 68, 13.3.1992 ("**UK Tractors Decision**").

³⁸⁷ Other analysis at (Capobianco, 2004) *op. cit.* (Ossowska, 2010) *op. cit.*.

³⁸⁸ " - the exact volume of the retail sales and market shares of each member-competitor on the United Kingdom market at national, regional, county, dealer territory and postcode sector level: this makes it possible to compare the market penetration and performance of each supplier down to the smallest geographical level; it is possible to compare the performances not only of the manufacturers but also of their dealers in each dealer territory, - the exact volume of the retail sales and the exact market shares of every specific model sold by each member: this permits comparison of the performance of specific models of each member-competitor; the comparison is equally done at the level of geographic zones which can be determined by each member, - the exact volume of the retail sales and the market shares of specific horsepower groups for each member: this permits comparison of the performance and market penetration of each member-competitor in specific horsepower bands which are usually categories of 10 horsepower grouping; there are also breakdowns by driveline (two-wheel four-wheel / articulated), - the daily and monthly retail sales and market shares at United Kingdom level for each member: this permits comparison of the latest most up-to-date sales performance of each participating supplier on the United Kingdom market and their evaluation during the current month." UK Tractors Decision para. 18.

Fourthly, the ability and easiness of the players involved in the scheme to find deviation and to punish it well as their ability to monitor parallel imports.³⁸⁹

The Commission concluded that the exchange restricted competition and put forward two main theories of harm. According to the Commission, the exchange would: (a) destroy hidden competition (meaning that in an already oligopolistic market, if it becomes more transparent the limited competition remaining will be lost) and (b) increase barriers to entry.³⁹⁰

The Commission pointed out that in this highly concentrated market, 'hidden competition' was essentially that element of uncertainty and secrecy between the main suppliers regarding market conditions without which none of them had the necessary scope of action to compete efficiently.³⁹¹

In sum, the Commission took a look at the characteristics of the market and concluded that there was a *de facto* oligopoly with high barriers of entry and strong brand loyalty. In this scenario, the market conditions had created a stable situation that the oligopolists wanted to protect by being able to spot any “mavericks” or hidden competition and thus having the capability to react quickly.

As to the application of Article 101.3, the Commission concluded that the parties had not proved the requirement of the indispensability of information which

³⁸⁹ “On the contrary, the high market transparency between suppliers on the United Kingdom tractor market which is created by the Exchange takes the surprise effect out of a competitor's action thus resulting in a shorter space of time for reactions with the effect that temporary advantages are greatly reduced. Because all competitive actions can immediately be noticed by an increase in sales, the consequences are that in the case of a price reduction or any other marketing incentives by one company the other can react immediately, thus eliminating any advantage of the initiator. This effect of neutralizing and thus stabilizing the market positions of the oligopolists is in this case likely to occur because there are no external competitive pressures on the members of the Exchange except parallel imports which are however also monitored as has been explained above.” UK Tractors Decision para. 37.

³⁹⁰ “In addition, account must be taken not only of the immediate visible effects on an agreement but also of its potential effects and of the fact that an agreement can create a structure likely to be used for anticompetitive purposes. Article 85 (1) must be interpreted as including potential anticompetitive effects because the objective of that provision is the maintenance of an effective competitive structure within the meaning of Article 3 (f). This objective is particularly material in a highly concentrated market where an information exchange creates a structure of transparency which prevents hidden competition and increases barriers to entry for non-members”. UK Tractors Decision para. 51.

³⁹¹ See UK Tractors Decision para. 37.

identifies the performance of individual manufacturers and individual dealers to achieve the alleged benefit. According to the Commission, these benefits could have also been derived from own company and aggregate industry information.³⁹²

The possibility of having more cases such as *UK Tractors* at the EU level seems highly unlikely given that this case occurred prior to Regulation 1/2003,³⁹³ therefore, under the previous notification regime. Thus the agreement was prohibited but the companies were not sanctioned.

In our view, the true purpose for all the parties involved in the agreement in *UK Tractors* was to decrease uncertainty as to the behavior of all competitors (incumbents and potential) but there was no specific agreement tacit or explicit as to the use that each oligopolist would give to this information. There was neither any evidence on collective retaliation nor any sign that competitors would expect others to retaliate to any aggression to their shares by potential competitors. Therefore, the most sensible alternative was prohibiting the conduct without fining it monetarily.

In other words, *UK Tractors* is a prohibiting decision, therefore, there was not truly an “infringement” of Article 101 TFEU, understood as an administrative offence, instead, it would be more adequate to say that the behavior contradicts the principle and purposes of the general prohibition contained within Article 101 TFEU. Unfortunately, the ECJ did not find necessary to nuance the opinion so much.

3. Self-standing information exchange agreements: prohibition rather than punishment

In this sense, the *UK Tractor* decision would be consistent with the recent *ASCOPA* decision of the Swiss Competition Authority or the *Whatif* decision of the OFT (as opposed to the *RBS/Barclays* case).

In *ASCOPA*, the Swiss Competition Authority concluded that - despite the sharing of consistently detailed product information - no monetary sanction should be

³⁹² *UK Tractors* Decision op. cit.

³⁹³ Nonetheless, it seems a useful theoretical exercise to hypothesize whether a sanction would or should have been imposed to the members of the agreement if it had taken place after Regulation 1/2003. As we will see later on, some national decisions provide an interesting background of comparison.

imposed since the agreement to exchange information was not aimed to fix prices or quotes even though it concluded that it was anticompetitive.³⁹⁴

This conclusion fits again very nicely with our theoretical understanding of competition as a principle embedded into an open provision, which can be infringed, but only clear rules that emanate from this principles – such as the prohibition against hard core cartels – can be properly infringed in the sense of requiring a monetary sanction as a result.

As a result, the lack of clear rules, affects the legality of the sanction, but almost inevitably also the culpability of the conduct, given the lack of knowledge of the rule, and, therefore, the willingness of the parties to infringe the rule.³⁹⁵

Under this perspective, the intentionality element (determined by circumstantial evidence) provides a very helpful explanation for the otherwise difficult distinction between information exchanges which end up in a commitment decision or in a very high fine, as the recent OFT investigations regarding the car industry ("*Whatif? Private Motor*") and the Libor industry (*RBS/Barclays*) illustrate.

³⁹⁴Favre, P., and S. Venturi. "Competition Commission prohibits information exchange in luxury cosmetics industry." *International Law Office*, 2012 "The commission found that the information on gross sell-in prices allowed the ASCOPA members to adapt their own gross prices to accord with those of their competitors and, by doing so, to restrict competition on net sell-in prices (ie, the prices after discounts). The commission further found that, with respect to turnovers, the exchanged data was so detailed that each participant was in a position to calculate the volume of products supplied by the others and, as a result, to control the evolution of its own market share in relation to those of its competitors. As far as marketing expenses were concerned, the commission considered that the information was sufficiently detailed to provide information on the budget allocated by each participant for the promotion of its specific product lines, thereby allowing the other participants to compare such budget with the relevant undertaking's turnover. The ASCOPA members could then integrate this data into their cost analyses when assessing the opportunity to launch a new product; they were also in a position to adjust their pricing policies in response to the other members' strategies. (...)The commission did not fine the undertakings involved, considering that their conduct did not fall within the category of behaviour for which fines may be imposed under Swiss competition law. In particular, the commission found that the information exchange on gross sell-in prices could not be deemed as a price-fixing agreement within the meaning of Article 5(3) of the Competition Act, because: the exchanged information allowed the undertakings to compare only certain referenced products against each other; and the investigation did not show that the undertakings had agreed on the gross prices of certain products." See also, (Alfaro, Como se analiza un intercambio de información o qué bien legislan los suizos: Caso suizo de cosmética de lujo, 2012) *op. cit.*

³⁹⁵ On the connection between these two principles and culpability as a justification for the existence of the legality principle see (Roxin, *Derecho Penal. Parte General*. Tomo I, 2008) *op. cit.*

As it is well-known, whereas in the first case, the OFT reached a commitment decision with the IT developers and the car insurance companies to develop a software that would allow insurance companies to gather useful but not strategic information on insurance premiums, thus, not sanctioning the companies. In the second one, however, the OFT fined RBS with 28 million pounds for disclosing unilaterally and through junior employees to Barclays its intention to raise prices of its loans.³⁹⁶

In other words, in RBS/Barclays the information exchange facilitated a cartel and, therefore, the conduct had to be prohibited and sanctioned. In the Whatif? Case, the exchange contradicted the objectives of Article 101 TFEU and the conduct needed to be modified, but not sanctioned.

The other main information exchange agreement discussed at the ECJ level is the Spanish *Asnef-Equifax* case. In this case, the defendants argued that the purpose of the agreement³⁹⁷ was to reduce uncertainty as to the solvency of the clients and improve business decisions, whereas the claimants reasoned that the exchange of information regarding the credit history of the borrowers facilitated tacit collusion.

³⁹⁶ In our opinion, the RBS case is very interesting since even though it is technically the result of a leniency application and therefore a cartel, the OFT does not clearly define it as such. See for example, its conclusion as to the object of the concerted practice. Paragraphs 322 to 325 of the Decision “*The agreement and/or concerted practice in this case took the form of the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over a period of months. The information provided related to RBS's general pricing for loan products to Large Professional Services Firms and to at least two customer-specific proposed loans, namely those to Savills and to Knight Frank. The information was useful and of practical value to Barclays and at least sufficient to highlight to Barclays that there would be less downward pressure on its prices than Barclays might otherwise have expected. As such, the provision by RBS to Barclays of this information can be regarded, by its very nature, as being injurious to the proper functioning of normal competition. Moreover, the background to these contacts (for example, the implementation of the Basel II accord in the UK and the resulting pressure on pricing and margin) clearly suggests that the purpose of these disclosures was to influence Barclays' pricing.*”

³⁹⁷ In this case the Court considered that it was not necessary to determine whether the scheme constituted a concerted practice or an agreement “*It follows that Article 81(1) EC may apply to the conception and the implementation of the register, without there being any need to characterise precisely the form of the cooperation thus established between those institutions*” *Asnef-Equifax* paragraph 31. Nonetheless, looking at the terms of the judgment, it seems clear that in reality there was an agreement among the Spanish credit institutions to create a registry of credit rating that would aid financial institutions when granting loans. In our opinion, the fact that an institution had been created, with its own facilities and legal personality supports the conclusions that there was an agreement. Similarly, (Wagner-von Papp, 2012) *op. cit.*

The ECJ, on response to a preliminary reference asked by the Spanish Courts, concluded that the agreement was pro-competitive provided that access was not discriminatory since it benefitted consumers as a whole by ensuring better allocation of financial resources.

The Court did not rule under a 101.3 analysis but under a 101.1 analysis.³⁹⁸ Therefore, despite there was a reduction in uncertainty, it did not rule that there was an infringement by object, which is what T-Mobile, read broadly, seems to suggest as we will see in section C.³⁹⁹

The facts of the Asnef-Equifax suggest that there could be room for these facts to be labelled as anticompetitive. For example, if access to the register was limited to certain financial institutions. However, if that were the case in our view, we would be talking about a collective refusal to supply (“*boycott*”) rather than a pure information exchange infringement/agreement.⁴⁰⁰

However, the most interesting aspect of the debate is that the conduct did not infringe Article 101.1 TFEU, why? In our opinion, because there was no contradiction

³⁹⁸ This is our reading of the judgment and seems to be as well the reading that the Spanish Supreme Court (STS 6317/2007) made when it ruled after the preliminary reference that there had not been an infringement of article 1 of the Spanish Defence of Competition Act. “*En consecuencia, no puede incluirse el indicado fichero entre las prácticas prohibidas por el artículo 1º de la LDC, lo que es suficiente para estimar la casación, sin necesidad de entrar a examinar si se dan los requisitos para la autorización de conductas prohibidas establecidos en el artículo 3 de la LDC. A partir de la anterior conclusión, debe también estimarse el recurso contencioso-administrativo, y acceder a las peticiones de la demanda, declarando la nulidad del acto recurrido y el derecho de la recurrente a poner en funcionamiento el fichero controvertido*”.

Available here
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?numero=A+209/97&ambito=Conductas>

³⁹⁹ Obviously, there are several key differences between Asnef-Equifax and T-Mobile. First, in Asnef-Equifax transparency in the market was increased (more information about credit history) but not with regards to the future behavior of the companies (there was no disclosure on what banks considered a bad credit history or the interests they would attach to it). Secondly, as a result there was freedom on the parties on how to use that information in the market.

⁴⁰⁰ Please note, in relation with the above, that one could argue that the Asnef-Equifax case supports the opinion of some scholars who argue that Article 101.3 TFEU should only be applied to cartel infringements whereas the remaining infringements should be dealt under Article 101.1 TFEU. (Alfaro, *El Proceso de Configuración del Derecho de la Competencia a la luz de la doctrina del Tribunal de Justicia de la Unión Europea*, 2014), *op. cit.*, this was an option that was, in fact, debated during the modernization process prior to Regulation 1/2003.

with the general principle and even less, with any clear rules, there was no cartel, and there was no evidence that the exchange of the credit history could have an impact on prices or quotas.⁴⁰¹

J. The evolution of the concept of concerted practices jointly with that of information exchanges and why they have become almost synonyms

Before we have seen how our theory provides an explanation for the seemingly schizophrenia of competition authorities regarding their reactions towards information exchange agreements. Now, it is time to dig into a more difficult issue, the fitting of information exchanges as concerted practices.

We should warn our reader that in the next pages we will dwell into many incongruities, starting with the fact that the “Guidelines on Horizontal Cooperation *Agreements*” devote most of the discussion to analyze information exchanges as “*concerted practices*”.⁴⁰²

This contradiction⁴⁰³ reflects one of the key features of information exchanges today, their confusion with the concept of concerted practices.

As we will see next, information exchanges, as a self-standing infringement, have developed in parallel and thanks to the expansion of the meaning of concerted practices, to such an extent that, nowadays, one cannot be understood without the other.⁴⁰⁴

⁴⁰¹ For an analysis of prior decisions of the Spanish Competition Tribunal regarding this type of schemes, see (Marcos, Registros de Morosos y Defensa de la Competencia, 2007).

⁴⁰² (Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements, 2011) whereas information exchanges as agreements are briefly mentioned, information exchanges as concerted paragraphs are treated in its subsection in paragraphs 60 to 64.

⁴⁰³ Also pointed out to some extent by (Ghezzi & Maggiolino, 2014) *op. cit.*

⁴⁰⁴ A mere look at the AG Kokott’s opinion in *T-Mobile* *op. cit.*, delivered on 19 February 2009, will convince the reader how they were used in that case as practical synonyms. See for example the first paragraph of the opinion “*the present reference for a preliminary ruling presents the Court with the opportunity to clarify the requirements which must be satisfied to establish a concerted practice with an anti-competitive object for the purposes of Article 81(1) EC.*” See also paras. 35 to 41 of the Opinion.

After this explanation of the concept of concerted practices today,⁴⁰⁵ we will better understand why it is hard to believe that pure information exchanges could be framed jointly as (a) self-standing infringement and (b) an agreement, unless they are a facilitating practice in a cartel case or a cartel on themselves.⁴⁰⁶ Or in other words, by only information exchanges that clearly infringe pre-established rules should be (and normally are) sanctioned.

In addition, we will explain why it is so tempting for Competition Authorities to frame information exchanges as concerted practices, even if it is clear to them that reaching a commitment decision (negotiating) is a reasonable mechanism to solve the problem.⁴⁰⁷

1. The original meaning of concerted practices: Dyestuffs

Originally, the term concerted practice was coined by the founding Member States as a mechanism to capture collusive behavior absent a clear smoking gun. The term “practice” is quite telling on this regard. Absent a meeting in a “smoke-filled” room, the Commission could look at the actual behavior of the companies **in the market** - “their practices” - to ascertain whether there had been some type of concertation (coordination/cooperation) which could explain the behavior of the market.⁴⁰⁸

Thus, the Commission could qualify that parallel behavior in the market as a concerted practice. In other words, a concerted practice was the legal mechanism by

⁴⁰⁵ This might be due to the fact, as Professor Albors-Llorens has pointed out, that the notion of concerted practice has centered around the existence of an act of communication between undertakings, aimed at lessening uncertainty concerning their future market behavior Albors-Llorens, A. "Horizontal Agreements and Concerted Practices in EC Competition Law; Unlawful and Legitimate Contacts between Competitors." *Antitrust Bulletin*, 2006: 837-876, page 858.

⁴⁰⁶ Unless one can argue that the concept of agreement for vertical relationships (such as the Bayer case) differs from the concept for horizontal relationships.

⁴⁰⁷ For a shorter description see (Ghezzi & Maggiolino, 2014) *op. cit.*

⁴⁰⁸ (Ghezzi & Maggiolino, 2014) *op. cit.*

which the Commission could find an infringement of article 101 TFEU through indirect/circumstantial evidence after observing suspicious behavior in the market.⁴⁰⁹

Put it differently, originally concerted practices (similarly to the US definition) where just the flip side of a cartel. If the Authorities could not show the existence of an agreement, they could show the parallel behavior and infer its existence.

That is why, in our opinion, the Advocate General in *Dyestuffs*⁴¹⁰ considered that one cannot dissociate the idea of a concerted practice from the real effect that it has on the competitive situation within the Common Market.⁴¹¹

This conclusion – that a concerted practice referred to parallel behavior observed on the market without a rational business explanation - is supported by Article 101.2 TFEU which deprives any anti-competitive “agreement or decision” from its legal effects.⁴¹²

Logically, Article 101.2 TFEU did not mention concerted practices as they cannot be deprived of legal effects since by their own nature they could not be

⁴⁰⁹ (Bellamy & Child, 2008) *op. cit.*, (Albors-Llorens, 2006) *op. cit.*

⁴¹⁰ Case 48/69, *ICI v Commission* [1972] ECR 619, opinion of AG of May 2, 1972. See also Flint, D. "Comportement parallèles conscients et pratiques concertées." 33 *Revue Internationale de Droit Comparé* 1, 1981: 33-53.

⁴¹¹ Case 48/69, *ICI v Commission* [1972] ECR 619, opinion of AG of May 2, 1972 page 671: “Even if it is accepted that a concerted practice in fact conceals an agreement and at the same time reveals it through the appearance of some co-ordinated conduct, there is to my mind no doubt that in making a separate 'category' for concerted practices, the authors of the Treaty intended to forestall the possibility of undertakings' evading the prohibitions of Article 85 on activities inimical to competition by so conducting their affairs as not to leave any written document which might be called an agreement, even while conducting a common policy in accordance with an established plan. Such an interpretation, which takes practical account of the distinction made in Article 85, is of obvious interest as regards evidence for the existence of a concerted practice which, even though it implies that the will of the participating undertakings is somehow apparent, nevertheless cannot be sought using the same methods as for proof of an express agreement. However, an objective criterion, which is basic to the concept of a concerted practice, must also be met. This is that the participating undertakings must in fact have acted in the same way. This is the first difference of principle from the concept of an agreement in that, according to your case-law, an agreement, provided that its existence is established and that it has as its object an adverse effect on competition within the Common Market, is prohibited under Article 85 without its being necessary to consider the real effect of the said agreement on competition.” Also (Albors-Llorens, 2006) *op. cit.*

⁴¹² Rivas, J., and G. Van de Walle De Ghelcke. "Concerted Practices and Exchange of Information: An Overview of EU and national case law." *E-Competitions*, 2012.

incorporated into a legal contract.⁴¹³ This was the interpretation of the term concerted practices applied by the ECJ in *Dyestuffs*.

a) *The meaning of concerted practices in Dyestuffs*

In 1972, in *Dyestuffs*,⁴¹⁴ the ECJ was confronted for the first time with the task of providing a definition of the term “concerted practices”. The Court was asked to explain, within the context of an oligopoly, the criteria that helped distinguishing conscious parallelism from anticompetitive behavior.⁴¹⁵

The Court coined the famous definition of concerted practices by pointing out that:

“Article 85 [101] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”⁴¹⁶

The element of coordination was crucial in the Court’s understanding of a concerted practice. As the Court explained, by its very nature, a concerted practice does not have all the elements of a contract “*but may, inter alia, arise out of coordination which becomes apparent from the behavior of the participants.*”

⁴¹³ This point is nicely illustrated by the Advocate General in *Consten*.

⁴¹⁴ Case 48/69, *ICI v Commission* [1972] ECR 619, hereinafter “**Dyestuffs**”.

⁴¹⁵ For a thorough analysis of the case, see Korah, V. “Concerted Practices, The EEC Dyestuffs case.” *Modern Law Review*, 1973. Brief commentaries are also available at (Wish, Competition Law, 2012) *op. cit.* and (Faull & Nikpay, 2014) *op. cit.*

⁴¹⁶ *Dyestuffs* at 64. The Court intended to articulate a concept of concerted practices as a legal concept which was different from the term agreement. The distinction, even though it made sense from a purely legalistic and linguistic perspective, was doomed to fail, given the grey zone dividing express coordination, tacit collusion and mere interdependence that we have seen in the review of the economic literature. In this regard, see page (Joshua & Jordan, 2004) page 659

This statement is quite telling in two regards. First, by pointing out the coordination was a crucial element the Court was making clear that unilateral behavior should fall outside Article 101 TFEU. Secondly, by focusing on the behavior of the participants, the Court was opening the door to using indirect factual evidence as proof of the subjective element (the mental state).⁴¹⁷

Concerted practices captured, therefore, anticompetitive behavior where there was no clear evidence of an agreement. In other words, they were a mechanism for the Commission to police market behavior which seemed to respond to competitors' concertation but where there was no smoking gun, (i.e. no factual evidence of the competitors deciding to take that action: no meetings, no trade association, no joint venture, etc.).⁴¹⁸

b) The relevance of the transparency in Dyestuffs

In *Dyestuffs*, the Court was asked to analyze the price increases that had taken place at the same time, on the same products, by the same percentages by competitors in different national oligopolistic markets. The Court pointed that even though clear parallel behavior (from a factual point of view) was not in itself anticompetitive, it could be evidence of anticompetitive behavior when analyzed in the overall context of the functioning of the market.⁴¹⁹

As we have seen in the analysis of the economic literature on information exchanges, under certain circumstances, it might be very difficult to distinguish parallel behavior (both companies adopting individually the same decisions in the market) from coordinated behavior.⁴²⁰

⁴¹⁷ (Korah, 1973) Korah, V. "Concerted Practices, The EEC Dyestuffs case." *Modern Law Review*, 1973, (Ris, 1990) (Albors-Llorens, 2006).

⁴¹⁸ Ris, M. "The European Community Rules on Competition." *Boston College International and Comparative Law Review*, 1990: 466-481.

⁴¹⁹ *Dyestuffs* at 66.

⁴²⁰ (Kaplow & Shapiro, Antitrust, 2007) *op. cit.* As Kaplow and Shapiro put it: "at one extreme, if competitors meet in the proverbial smoke-filled room, negotiate a detailed cartel arrangement, sign it, and implement it—and, importantly, this all can be proved in a legal proceeding – an agreement and hence a legal violation will undoubtedly be found to exist. At the other extreme, no agreement would presumably exist and no violation would be found due to the mere fact that competitors'

The conclusions on this debate on where to draw the line - also known as the Turner-Posner debate - can be summarized as follows: information exchanges which are not justified by dominant strategies in equilibriums complying with competition laws, can provide inferences that the market behavior is the result of some sort of coordination (collusion) and not the similar individual reaction of the competitors to a change in the market circumstances, provided that the market structure would allow such collusion to arise out from an information exchange.⁴²¹

The Court took the view that parallel behavior, on the one hand, and an infra-competitive market situation, on the other, where particular evidence that could lead to the conclusion that there was a concerted practice.⁴²²

In *Dyestuffs*, the Court paid attention to the fact that the price increases had not been directly applied but instead they had been announced in advance.⁴²³

The increased transparency in the market was, therefore, an element that the Court took into consideration to conclude that there had been a concertation.

prices are equal—as one expects with homogeneous products and perfect competition, for example—or that they sometimes move together—as tends to occur when there are shocks to input prices (think of retail gasoline stations changing sale prices when prices from refineries change). The difficult cases fall at various points in between, in terms of what transpired and what can be proven before a Tribunal”

⁴²¹ (Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, 1999) *op. cit.* and (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.* According to the Court: “*Although parallel behavior may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.*” *Dyestuffs* at 66.

⁴²²In the words of the Court: “*This is especially the case [anticompetitive behavior] if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the Common Market and of the freedom of consumers to choose their suppliers.*” *Dyestuffs* at 67.

⁴²³ (Korah, 1973) *op. cit.* The Court pointed out that: “*By means of these advance announcements the various undertakings eliminated all uncertainty between them as to their future conduct and, in doing so, also eliminated a large part of the risk usually inherent in any independent change of conduct on one or several markets. This was all the more the case since these announcements, which led to the fixing of general and equal increases in prices for the markets in dyestuffs, rendered the market transparent as regard the percentage rates of increase. Therefore, by the way in which they acted, the undertakings in question temporarily eliminated with respect to prices some of the preconditions for competition on the market which stood in the way of the achievement of parallel uniformity of conduct.*” *Dyestuffs* at 101.

However, it was not the element on which the entire case gravitated.⁴²⁴ The individual announcements constituted a facilitating practice (a plus factor) towards the commission of the infringement.⁴²⁵

The Court took also particular attention to the circumstances of the market and studied whether those announcements had been spontaneous or some kind of anticompetitive willingness could be derived from them.⁴²⁶ Moreover, the Court focused more on the content of the announcement, the type of commitment the companies were making and whether there was a business rationale behind them, rather than the fact that those announcements on themselves decreased the transparency in the market.⁴²⁷

In *Dyestuffs* the Court implicitly concluded that there had been a cartel in the Dyestuffs market whose objective was to raise prices in the common market.⁴²⁸ This

⁴²⁴ (Ghezzi & Maggiolino, 2014) *op. cit.*

⁴²⁵ Similarly, although drawing a distinction between plus factors and facilitating practices, see Joshua, J., and S. Jordan. "Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law." 24 *Northwestern Journal of International Law & Business* 3, 2004: 647 - 682. page 663 "This dilemma has been grappled with in European cases. The *Dyestuffs* case was in fact the first occasion on which the Commission and Courts had to test the validity of "economic" evidence and argument. The characterization of the infringement in that case as a "concerted practice" was somewhat puzzling given the facts. While it is true that advance price announcements figured strongly-on three occasions the ten or so producers all announced identical price increases across the Community within a day or so of one another-the Commission's decision revealed that meetings had taken place in Basel and London to discuss prices just before the simultaneous announcements.⁶⁰ There was also other circumstantial evidence of pre-arrangement. This surely sounds like an open and shut "plus factors" case, inferring an actual agreement from circumstantial evidence".

⁴²⁶ (Kühn & Vives, 1995) *op. cit.*

⁴²⁷ Criticizing that the Court forgot to mention other factors take into account by the Commission on its decision which also suggested the collusive behavior of the firms. (Korah, 1973) *op. cit.* In this regard, the Court held: "The fact that this conduct [the announcements and their content] was not spontaneous is corroborated by an examination of other aspects of the market. In fact, from the number of producers concerned it is not possible to say that the European market in dyestuffs is, in the strict sense, an oligopoly in which price competition could no longer play a substantial role." *Dyestuffs* at 104-105.

⁴²⁸ The Court concluded that: "Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases. In these circumstances and taking into account the nature of the market in the products in question, the conduct of the applicant, in conjunction with other undertakings against which proceedings have been

cartel had been articulated through a concerted practice, instead through a gentleman's agreement in "smoke filled room", and the unilateral announcements constituted circumstantial evidence of such concertation since they acted as a facilitating mechanism to reach the mental state of cooperation.⁴²⁹

**c) *The lack of an alternative unilateral business
explanation***

The state of the law after *Dyestuffs* was that when there was (i) factual evidence in the market of a possible anticompetitive behavior (all companies raising prices at the same time) and (ii) there was no smoking gun (no documents showing an agreement, no meetings between the parties, etc.), the Commission could reach the conclusion that the parties had tacitly decided to pursue an anticompetitive goal provided that: (a) the conditions of the market suggested that it could not have reached that situation on itself, (b) there was evidence of facilitating practices supporting the idea that there was a tacit meeting of the minds (public announcements) and (c) there was no alternative unilateral business rationale for those facilitating practices other than the willingness to reach a collusive outcome.⁴³⁰

taken, was designed to replace the risks of competition and the hazards of competitors' spontaneous reactions by cooperation constituting a concerted practice prohibited by Article 85(1) of the Treaty".

See the interesting remarks made by (Joshua & Jordan, 2004) *op. cit.* page 665 "Some academic writers attacked the Court's judgment in the *Dyestuffs* case on the ground that it declared conscious parallelism presumptively unlawful on the basis of economic evidence alone. However, the Court's broad dictum has to be read in context: the judgment made it clear that standing on its own conscious parallelism could not be found unlawful. Whether or not there was actual collusion could be correctly determined only if all the evidence on which the contested evidence was based was treated not in isolation but as a whole-echoes here again of the constant U.S. antitrust case law on evidence in a conspiracy case. There was in fact a good deal of collusion evidence, even if the Court's analysis was based more on the adoption of "facilitating practices" rather than on "plus factors" pointing to a conspiracy. It is also important to appreciate that the Court in its judgment relied on the so-called "structural factors" not as circumstantial evidence to prove collusion but in order to assess whether the advance price announcements could act as a facilitating device"

⁴²⁹ The Commission decision suggests this reading, see in particular: "les infractions dont les entreprises intéressées sont responsables revêtent un caractère de gravité certain parce que, par les pratiques concertées de hausse des prix auxquelles elles se sont livrées, ces entreprises ont restreint d'une manière très importante le jeu de la concurrence". OJ 1969 L 195.

⁴³⁰ On the importance of this factor see (Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 2004) *op. cit.*, also joined cases C-89/85, *Ahlstrom v. Commission*, [1993] ECR I-1307 para. 71 "In determining the probative value of those different factors, it

Nonetheless, some authors intelligently warned about the risks this assumption, given that it is not always possible to assume that there is a "normal" set of conditions attributed to a particular market, deviation from which would indicate that collusion had taken place.⁴³¹

2. Blurring the meaning of concertation and the distinction between agreements and concerted practices: Suiker and Hüls

After *Dyestuffs*, the meaning of concerted practices undertook a considerable evolution.⁴³² The case law of the ECJ witnessed two parallel developments which intertwined over the years. On the one hand, information exchanges became self-standing infringements and were incorporated into Article 101 TFEU as concerted practices. On the other hand, the interest in prosecuting long and complex cartels ended up by softening the distinction between cartels and concerted practices.

must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see the judgment in Suiker Unie, cited above, paragraph 174). Nuanced later on in T-48/98, Acerinox v Commission [2001] ECR II-03859 “The applicant’s claim that the alignment of its alloy surcharges with those applied by the other producers operating on those markets derived from mere parallelism of conduct attributable to the oligopolistic structure of the market in stainless steel flat products and to the transparency rules in Article 60 of the ECSC Treaty is unconvincing. Whilst it may follow from the case-law that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct (Ahlström Osakehtiö and Others, cited above, paragraph 71), the fact nevertheless remains, in this case, that the Commission has produced proof of prior concertation between the undertakings concerned, which involved the use and application of identical reference values in the formula for calculating the alloy surcharge.

⁴³¹ Alese, F. "The Economic Theory of Non-Collusive Oligopoly and the Concept of a Concerted Practice under Article 81." *European Competition Law Review*, 1999: 379, 381, (Albors-Llorens, 2006) *op. cit.*

⁴³² Similarly, (Ghezzi & Maggiolino, 2014) *op. cit.* Explaining the evolution as an “elaboration” rather than a change see (Wish, Competition Law, 2012) *op. cit.*

**a) From the absence of a unilateral business
explanation to the independent economic policy doctrine**

The first development can be traced back to the *Suiker Unie* case.⁴³³ In this case, when analyzing the concerted practices relating to the restriction of sugar exports to the Netherlands by SU, CSM, RT and Pfeifer & Langen, the Court established the principle that companies should make their business decisions individually (an idea somehow implicit in the Dyestuffs reasoning). According to the Court:

*“The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that **each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.**”⁴³⁴*

However, by focusing on the individual behavior of the firms, the Court was changing the angle of the analysis of a concerted practice.⁴³⁵ Particularly, when we realize that the Court was not limiting its analysis to “competitors” but to a broader concept: “economic operators”.⁴³⁶

Instead of focusing on the parallel behavior and the *casual link* with the competitors’ actions (*Dyestuffs*), the Court was focusing on showing *concertation* by looking at the indirect evidence of collaborative evidence and setting out a

⁴³³ C 40/73, *Suiker Unie and others v. Commission* [1975] ECR 1663, hereinafter “***Suiker Unie***”.

⁴³⁴ *Suiker Unie* at 173.

⁴³⁵ (Joshua & Jordan, 2004) *op. cit.* page 665 “*In the later Suiker case, the Court of Justice expanded on its earlier dictum regarding concerted practice and emphasized that the coordination in question did not in any way require the working out of an actual plan agreed in advance*”

⁴³⁶ (Ghezzi & Maggiolino, 2014) *op. cit.*. As it has been brilliantly explained by Ghezzi and Maggiolino, up to that time parallelism (market behavior) had still a chief function within the boundaries of the notion of concerted practices. Not only, in practice, it was the starting point of any prosecuting strategy, adjudicating and reviewing activity, but also, on the theoretical level, parallelism distinguished concerted practices from agreements.

presumption of absence of justification for information exchanges that it is for the companies to rebut.⁴³⁷

The Courts' reasoning in *Suiker Unie* transformed an idea which was secondary in *Dyestuffs* - the fact that the announcements did not seem to be spontaneous – to a key element in the legal analysis. The Court incorporated the ideas laid down in *Dyestuffs* acknowledging the right of market participants to react and adapt to their competitors behavior. Nonetheless, it expanded the concept of “concerted practices” by laying out a general policy principle against direct or indirect contacts between competitors which was not present in *Dyestuffs*.⁴³⁸

According to some commentators, *Suiker Unie* demonstrates that businesses violate article 101 TFEU prohibitions on concerted practices, basically, when they maintain direct or indirect contact with competitors.⁴³⁹ In fact, some have argued that the Court made it plain that practical cooperation was to be understood broadly, and that the net of collusive practices would catch any contact between undertakings aimed to remove uncertainty as to future market behavior.⁴⁴⁰ In other words, communicating had become on itself a “practice”.⁴⁴¹

The Court was setting out, therefore, the *iuris tantum* presumption that there is no business rationale for disclosing future market conduct, other than

⁴³⁷ This approach became consistently applied after the Commission's backlash in, C-89/85, *Ahlström Osakeyhtiö and others v. Commission* [1993] I-01307, hereinafter “**WoodPulp**”. After this, previous contacts would taint all parallel behavior. See supra note 430.

⁴³⁸ According to (Wish, Competition Law, 2012) *op. cit.* page 113 “*These two cases provide the legal test of what constitutes a concerted practice for the purpose of Article 101: there must be a mental consensus whereby practical cooperation is knowingly substituted for competition; however, the consensus need not to be achieved verbally, and can come about by direct or indirect contact between the parties*”.

⁴³⁹ (Ris, 1990) *op. cit.* page 472.

⁴⁴⁰ (Albors-Llorens, 2006) *op. cit.*.

⁴⁴¹ According to the Court: “*it [principle of individual business decision making] does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors.*”

achieving an anticompetitive behavior, and moving away from the “competitor” rationale to the “economic operator” one.⁴⁴²

This statement marks the beginning of the legal construction of information exchanges as self-standing infringement - *it is strictly precluded (...) to disclose to such a competitor the course of conduct which they themselves have decided to adopt* – therefore, moving away from the more traditional facilitating practice approach.

However, the ECJ’s findings in *Suiker Unie* should - despite its compelling language – have been read in the context of the particular circumstances at stake: a cartel case.⁴⁴³

Indeed, the facts of the case suggested that the Commission had factual evidence of: (a) anticompetitive behavior (market allocation and refusal to supply), (b) in an industry where there was sufficient surplus for effective competition within the single market, where (c) there was evidence of the producers imposing conditions to its exporters - which did not seem justified by individual competitive business rationales, and where (d) communications between them which acted as a facilitating practice towards the implementation of the agreement, as the exporters were confirming their course of action, to ensure that they would not re-sell the sugar outside the terms of the tacit agreement.⁴⁴⁴

⁴⁴² A presumption that, over time, has proven very difficult to be rebutted. See Bailey, D. ““Publicly Distancing” Oneself from a Cartel.” 31 *World Competition* 2, 2008: 177-203. Moreover, as we will see later on, a presumption that seems hardly to comply with the presumption of innocence contained in Article 6 ECHR. (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* page 559 “*The presumption that information exchange leads to a concurrence of wills on the market cannot be a foregone conclusion. That would conflict with the requirements of Article 6 ECHR, assuming of course that the presumption of innocence is relevant.*”

⁴⁴³ (Ris, 1990) *op. cit.*

⁴⁴⁴ The Court’s statements were made when analyzing the concerted practice between the Belgian and the Dutch producers of sugar whereby RT (the Belgian producer) had refused to supply sugar to middlemen in the Netherlands or sell directly to customers there (save for some specific industries), alleging that its production was destined to the national market and there were no surpluses. Nonetheless, the Commission’s data clearly showed an evident case of over production of sugar in Belgium. The Commission was able to show, moreover, that RT was channeling almost all its sales in the Netherlands, through the Dutch producers, who bought it and then sold it as if they had manufactured it themselves. This overproduction, coupled with the evidence of a meeting in the context of an association of sugar manufacturers for the apportionment of quantities, jointly with the letters written by RT, expressing that producers should work “*chacun chez soi*” was strong circumstantial evidence suggesting a concerted

The Court was sanctioning a conduct that it considered highly facilitating of a cartel visibly articulated through a concerted practice.⁴⁴⁵ However, its admonishing language⁴⁴⁶ (and the lack of a critical analysis of this case law later on), opened the door for the expansion of the concept of information exchanges by adding an additional presumption [the *iuris tantum* anticompetitive nature of any exchange of information between competitors] to a concept - “concerted practices” – which by its own nature already relied on circumstantial/indirect evidence.

***b) Concerted practices and agreements a continuum of conducts rather than the two sides of the same conduct:
Hüls***

The second development can be traced back to the Propylene saga which heavily contributed to the expansion of the concept of concerted practices by blurring its frontier with the concept of agreement⁴⁴⁷ and, indirectly, expanding the factual scenarios comprehended within the meaning of punishable information exchanges.⁴⁴⁸

practice to avoid selling to customers, who could resell in other territories. The Court found moreover (direct evidence) that there had been several telex messages between RT and its main intermediary for sale in the Netherlands (Export), where Export was making clear that it agreed with “*your [RT’s] plan, that is to say deliveries between sugar producers through traditional Belgo-Netherlands trading organizations, on terms satisfactory to export*”.

⁴⁴⁵ *Suiker Unie* at 192 “*The applicants have in fact engaged in concerted practices having as their object and effect the protection of the Netherlands market*”.

⁴⁴⁶ One could say that is a general risk in enforcing the principle of precedent without the detailed factual analysis and comparison study normally undertaken in the common law systems which might cause the Court to use only the general principle in subsequent cases without taking into sufficient consideration the particular facts where the principle arose.

⁴⁴⁷ The frontier was already very blurred for economists but less so for lawyers. On the merits of mixing these concepts see (Joshua & Jordan, 2004) *op. cit.* page 675 “*This approach-made possible only by the Commission’s full use of its investigative powers to make a historical reconstruction of the cartel’s activities despite all efforts at concealment-neatly moves the debate away from the semantics of whether the behavior complained of is an “agreement” or a “concerted practice.” The concepts are fluid and may overlap.*”

⁴⁴⁸ We believe that the Commission followed the path set in the Vegetable Parchment decision, which was not challenged before the Courts. In Vegetable Parchment, virtually all the manufacturers were members of the international trade association Genuine Vegetable Parchment Association. Through GVPA, the parchment manufacturers convened several meetings each year to set the rate of increase of vegetable parchment prices in the Benelux and Danish markets. At those meetings, the manufacturers generally set the rate and date of the next price increase. Subsequently, the price leader in each market sent the new price schedules via the GVPA Secretariat to all members for implementation In Vegetable

Rhône-Poulenc marks the beginning of the confusion of the legal concepts of agreement and concerted practices. In *Rhône-Poulenc* the Commission found that Polypropylene manufacturers had agreed to a system of price fixing and quota allocation supported by regular meetings.⁴⁴⁹

The Commission - confronted with a complex cartel whose intensity had varied over the years and where evidence of an agreement to fix prices was dubious as to some periods and markets - decided to characterize the infringement as a single infringement and defined the infringement as an agreement and/or a concerted practice depending on the specific period and behavior.⁴⁵⁰ Nonetheless, the CFI had no problem in blessing the Commission's heterodox (at the time) approach.⁴⁵¹

The CFI's views were confirmed and expanded by the ECJ in *Hüls*.⁴⁵² *Hüls* (also an addressee of the Propylene decision) had appealed before the ECJ the CFI's conclusions as to the merits of the Commission findings. The Court not only agreed

Parchment, the Commission held that this practice clearly constituted a concerted practice of price-fixing in violation of article 101 (Ris, 1990).

We submit that the distinction between the practices that implement a cartel and the practices that facilitate a cartel is a very difficult one to make and it is debatable whether it is only useful from a legal point but not from an economic perspective. One of the main problems is that there are many behaviors that can be labelled "a practice".

⁴⁴⁹ T-1/89, *Rhône-Poulenc v Commission* [1991] ECR II-867, hereinafter "**Rhône-Poulenc**"

⁴⁵⁰ *Rhône-Poulenc* at 117. As the CFI correctly pointed out, the reality was that, de facto, the Commission envisioned the entire infringement as a cartel: "It must be stated first of all that the question whether the Commission was obliged to characterize each factual element found against the applicant either as an agreement or a concerted practice within the meaning of Article 85(1) of the EEC Treaty is irrelevant. It is apparent from the second paragraph of point 80, the third paragraph of point 81 and the first paragraph of point 82 of the Decision, read together, that the Commission characterized each of those different elements primarily as an 'agreement'."

⁴⁵¹ "The Commission in the alternative characterized the elements of the infringement as 'concerted practices' where those elements either did not enable the conclusion to be drawn that the parties had reached agreement in advance on a common plan defining their action on the market but had adopted or adhered to collusive devices which facilitated the coordination of their commercial behaviour, or did not, owing to the complexity of the cartel, make it possible to establish that some producers had expressed their definite assent to a particular course of action agreed by the others, although they had indicated their general support for the scheme in question and conducted themselves accordingly. The Decision thus concludes that in certain respects the continuing cooperation and collusion of the producers in the implementation of an overall agreement may display the characteristics of a concerted practice" *Rhône-Poulenc* at 119.

⁴⁵² C-199/92 P, *Hüls AG v. Commission* [1999] ECR I-04287, hereinafter "**Hüls**".

with the “agreement and/or concerted practice” approach⁴⁵³ but in addition considerably lowered the burden of proof of the second requirement to show a concerted practice: the causal link.⁴⁵⁴

The Court began its analysis by providing a general description of the requirements of a concerted practice in the order established by *Suiker Unie* (first concertation, then causal link).⁴⁵⁵ However, instead of assessing whether those elements had been met in the case at stake, the Court developed and expanded the presumption laid out in *Suiker Unie*. The exchange of information became – absent evidence on the contrary - de facto concertation and the casual link was the mere result of continuing to exercise a business activity after receiving the information.⁴⁵⁶

Again, this reasoning should be understood within the facts of the case, where the Commission’s investigation pointed out clearly towards the existence of a secret explicit cartel. There was obviously an obstacle to the Court’s reasoning: could a concerted practice amount to an infringement by object?⁴⁵⁷

⁴⁵³ With regard to the application of the “agreement and/or concerted practice” flexible concept one could wonder whether its application should be restricted to long and complex cases. This does not seem to be the view of the OFT, for example, that considers that it is equally valid in short duration practices. See Decision No. CA98/01/2011 (RBS/Barclays) para. 221 “*While there is a particular overlap between the concepts of agreements and concerted practices in the case of single complex infringements of long duration, the same principle will apply to discrete infringements of short duration.*”

⁴⁵⁴ As explained at the beginning and discussed in further length later on, a concerted practices is compromised in principle of two elements: reciprocity (which from concertation has been diminished into a mere contact) and a causal link (behavior according in the market influenced by such contact).

⁴⁵⁵ “*It follows, first, that the concept of a concerted practice, as it results from the actual terms of Article 81(1) EC, implies, besides undertakings’ concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two*”. Hüls at 161.

⁴⁵⁶ According to the Court: “*The undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance*”. Hüls at 162.

⁴⁵⁷ It is important to bear in mind that at the time this was a debated issue. It is interesting to contrast these doubts with the judgment in *T-Mobile* where the Court took this point almost as irrefutable, without taking into account that a concerted practice, within a cartel, is very different from a self-standing facilitating practice labelled as a concerted practice, given the linguistic limits of Article 101 TFEU.

The Court answered in the affirmative by ruling that contrary to Hüls argument, a concerted practice is caught by Article 101(1) TFEU, even in the absence of anti-competitive effects on the market.⁴⁵⁸ The Court argued in support of this conclusion a literal reading of article 101 TFEU.⁴⁵⁹

By then, concerted practices had evolved from a legal mechanism to capture tacit parallel anticompetitive behavior through indirect or circumstantial evidence to become a sort of catch-all concept that decreased the burden of proof of the Commission to prove an actual agreement (i.e. the design of an actual plan) particularly in long or complex infringements.⁴⁶⁰

⁴⁵⁸ Hüls at 163.

⁴⁵⁹ Hüls at 164 “It follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive effect”. According to the Court: “although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does necessarily mean that the conduct should produce the specific effect of restricting, preventing or distorting completion.” Hüls at 165.

⁴⁶⁰ In our view, the Court was in this way, supporting the judgment of the Court of First Instance rendered a few months earlier in the PVC case, T-305/94 where the CFI ruled “In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 85 of the Treaty. The Commission is therefore entitled to classify that type of complex infringement as an agreement 'and/or' concerted practice, inasmuch as the infringement includes elements which are to be classified as an 'agreement' and elements which are to be classified as a 'concerted practice'. In such a situation, the dual classification must be understood not as requiring simultaneous and cumulative proof that every one of those factual elements reveals the factors constituting an agreement and a concerted practice, but rather as designating a complex whole that includes factual elements of which some have been classified as an agreement and others as a concerted practice within the meaning on Article 85(1) of the Treaty, which does not provide for any specific classification in respect of that type of complex infringement.”

Some commentators argued for a limited interpretation of the judgment suggesting that the Commission's standard for concerted pricing practices (within a cartel) no longer required a showing of a business's direct involvement in concerted pricing practices, but instead a showing of a business's membership in a cartel in which other members engaged in price-fixing activities. (Ris, 1990) *op. cit.* Unfortunately, as we will see later on there seems to be a tendency of the European Courts to expand rather than interpret restrictively previous case law, until the interpretation puts the very same concept at risk. See in this regard *Cartes Bancaires* at note 205 and accompanying text.

The reality is that the burden of proof had been significantly lowered in two ways. On the one hand, anticompetitive intention could then be inferred from mere disclosure and, on the other hand, the “practice” element of a concerted practice could be presumed, absent evidence on the contrary, from merely receiving the information and staying on business.

3. Blurring the meaning of causality: a presumption of presumptions: *Anic* a step forward from *Hüls*

The very same day that the *Hüls* decision was taken, the ECJ also published its judgment in the *Anic* case (also the Propylene cartel).⁴⁶¹ The Commission had appealed the judgment of the CFI partially annulling the Commission decision. One of the interesting aspects of *Anic* is that the company claimed that the distinction between an agreement and a concerted practice had consequences for the level of proof required of the Commission and, therefore, for the rights of defence of the parties.⁴⁶²

According to *Anic*, if a concerted practice could consist in the mental element alone, with no need for any physical element, the two concepts would become redundant and would differ only as to the degree of manifestation of intention, joint intention in the case of an agreement and the manifestation of unilateral intention in the case of a concerted practice.⁴⁶³

The Court ruled, on the one hand, that a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two. And that therefore, the Court of First Instance had committed an error of law in holding that the undertakings' collusive practices had necessarily had an effect on the conduct of the

(Ris, 1990) *op. cit.* “The Commission in *PVC* expanded the application of the concept of concerted practices by incorporating it into the concept of a cartel. While adopting the European Court's definition of concerted practices in *Imperial Chemical* and the *Sugar Cases*, the Commission, in effect, substantially broadened the concept's application.”

⁴⁶¹ Case C-49/92 P, *Commission v. Anic Partecipazioni SpA* [1999] ECR I-04125, hereinafter “**Anic**”.

⁴⁶² *Anic* at 103.

⁴⁶³ *Anic* at 103. The argument is, in our opinion, very elegant and it illustrates the problems that the overexpansive interpretation of the concept of concerted practices was raising. *Anic* claimed that, if the characters of the two concepts are to be kept distinct, a concerted practice must be recognised as having an additional physical element, to compensate for the more evanescent nature of the mental element. *Anic* at 103. The Commission countered that *Anic*'s alleged difference in the burden of proof was wrongly based on a literal construction of the term “concerted practice”, according to which 'practice' refers to conduct on the market and, consequently, to an objectively observable element. In its view, such a construction is contrary to the ratio legis which bolsters the prohibition by widening it to cover concerting arrangements that are less elaborate than a real. *Anic* at 107.

undertakings which participated in them.⁴⁶⁴ In a way, the Court was nuancing the previous case law that could be interpreted (as the CFI did) as implying that communicating was, in itself, a practice.

Nonetheless, the Court ruled - the same way as in Hüls - that subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.⁴⁶⁵ Therefore, in practice the conclusion was almost the same, given the limited scope for rebutting such presumption.

The *Anic* presumption - as it has become known - was created in a very particular context. That is, in order to capture loose forms of coordination where there was evidence of an agreement with varying degrees of intensity over the years. This presumption allows the Commission to capture infringements that could otherwise be left unpunished and has become with the years an essential tool for defending the existence of a single infringement in cartels that lasted for long periods of time.⁴⁶⁶

The paradoxical result of this ruling is that the presumption that helps categorize the conduct determines the infringement. **Any decrease as to the uncertainty of the behavior of the competitor becomes *de facto* a concerted practice and *de facto* an anticompetitive behavior absent an alternative business explanation.** This presumption coupled with the shift of focus, from the observance of parallel behavior in the market (search for the link), to the inference of a concerted practice from individual behavior in the market (focus on concertation),⁴⁶⁷ has resulted in the

⁴⁶⁴ *Anic* at 119.

⁴⁶⁵ *Anic* at 121.

⁴⁶⁶ In our opinion, this might be a reasonable policy allowance in cartel cases but not so much in self-standing facilitating practices.

⁴⁶⁷ See sharing these views (Ghezzi & Maggiolino, 2014) *op. cit.* “Such an answer [referring to *Anic*] produced two significant consequences. First, it lowered the burden of proof cast upon the Commission and other prosecuting authorities who enforce Article 101. From that moment onwards they were exempted from showing whether the ascertained collusion was further put into practice, or had actually affected market price and output. Second, the Court’s answer shifted the focus of Commission’s

intermingling of these two concepts as the recent *Bananas* and *T-Mobile* cases show (see below).

However, in order for this final step to take place, it was necessary for the ECJ to soften a requirement that it is implied in the terms “concertation” and “exchange”: the idea of reciprocity.

4. Blurring the meaning of reciprocity: from exchanges to disclosure, and from concerted practices to “a” practice: *Cimenteries* and *British Sugar*

In *Cimenteries*,⁴⁶⁸ the ECJ defined the meaning and requirements of the element of reciprocity⁴⁶⁹ expanding the scope of the *Anic* presumption.

The Court acknowledged that the requirement of reciprocity had been developed by Advocate General Darmon in *Woodpulp*⁴⁷⁰ but re-defined the fulfillment of the requirement in very broad terms: “*that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least accepts*”.⁴⁷¹

investigative and prosecuting efforts towards the very same episode of collusion – the exchange of strategic data – that was presumed to produce parallel practices. In other words, if collusion and parallelism were still the two building blocks of concerted practices, the possibility to presume the latter drove the spotlight on the former.”

⁴⁶⁸ Joined Cases T-25/95 and others, *Cimenteries* CBR, [2000] ECR II-491, hereinafter “**Cimenteries**”.

⁴⁶⁹ See supra note 454.

⁴⁷⁰ *WoodPulp* op. cit. opinion of AG Darmon delivered on 25 may 1988. *Woodpulp* is known as the main backlash for the Commission in the field of information exchanges. We do not study the case in depth for three reasons. First, because the Court found that there had not an information exchange. Secondly, because the recent investigation in the Container Liner Shipping Industry (see Commission’s press release of November 27, 2013) might shed a new light on the case, as it shares many similarities and, thirdly, because we have the impression that if ruled today *Woodpulp* would have been decided differently as the economics on cheap talk were not much developed at the time. For those reasons, we prefer to wait for any decision on Container Liner before looking back again to *Woodpulp*. On the similarities between these cases see (Sterling, 2014)

⁴⁷¹ *Cimenteries* at 1849.

The definition put forward, therefore, conveys that in order for the meeting of the minds to take place unilateral communications suffice, for as long as there is a sender of the message and an addressee of said message.⁴⁷²

This case again is an example of the concept of concerted practice being used as a mechanism to capture a loose form of coordination within a complex cartel.⁴⁷³ However, the language of the Court was so broad that it allowed for a general principle to be construed even absent documentary evidence (to some form or another) of a cartel.

Finally, the path towards incorporating unilateral disclosures into article 101 and commingling the concepts of “information exchanges” and “concerted practices” was leveled by the EU Courts in *British Sugar*.⁴⁷⁴

In this case the Commission found that British Sugar had infringed competition law by unilaterally informing its competitor (Tate & Lyle) of its future prices for sugar. The pricing disclosure behavior began after British Sugar had conducted a price war and had been sanctioned by the Commission for an abuse of dominant position.⁴⁷⁵

The case differed from the cartel cases seen above since the parties did not meet to discuss minimum prices or quotas. It was only unilateral pricing disclosure. Nonetheless, the difference was on the outset minimal. The parties did not need to

⁴⁷² *Cimenteries* at 1849. According to the Court, “it may be inferred therefrom that the contacts between Lafarge and Buzzi were motivated by the element of reciprocity essential to a finding of a concerted practice”. The language of the judgment is somehow confusing and suggests that the Court was envisioning the element of reciprocity as a mechanism to show the willingness (the mental state) of the parties to reach a tacit concerted practice.

⁴⁷³ In this case, the Commission case relied only on the record of the meeting held on 26 November 1988 between Lafarge and Buzzi which was drawn up by Lafarge’s representative shortly after the meeting and distributed internally. The document contained juicy statements such as “a war is pointless” or “agreements must be concluded to avoid conflict”. *Cimenteries* at 1850.

⁴⁷⁴ Joined Cases T-202/98 and others, *Tate & Lyle v Commission*, [2001] ECR II-2035, hereinafter “*British Sugar*”.

⁴⁷⁵ *British Sugar* and Napier Brown plead that the fact that information was supplied unilaterally by one undertaking to another was insufficient to constitute an infringement of Article 101(1) of the Treaty. In their view, for a concerted practice to be established, the Commission would have to prove that an exchange of information took place between the undertakings in question, concerning, in this case, their future pricing policy. *British Sugar* at 34.

agree on these issues (minimum prices or quantities) since the EU system at the time set out production quotas and minimum prices at which the authorities had to buy the sugar.⁴⁷⁶

The Court of First Instance ruled that the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.⁴⁷⁷

This is yet another case where the Court even though it might have been correct on the outcome, but phrased the rule in such a broad language that allowed for its expansion later on.⁴⁷⁸

5. The culmination of the distortion: T-Mobile

The rulings and findings contained in the cases cited above took place mostly in the context of complex cartels where the overall assessment of the direct and indirect evidence pointed quite clearly towards the existence of tacit collusion.

Nonetheless, they paved the way for information exchanges to become more and more, the only necessary evidence to pursue and sanction allegedly collusive scenarios, as the *T-Mobile* case demonstrates.⁴⁷⁹ Moreover, they provide Competition

⁴⁷⁶ The Commission argued that an exchange of information (i.e. information moving in both directions) is not an indispensable component of an infringement under Article 101 of the Treaty. The Commission considered that a trader ceases to determine his policy in an independent manner if he attends regular meetings at which he is informed of the prices which his main competitor is seeking to obtain in circumstances where he cannot fail to take account of that information. The parties did not challenge the existence of those meetings; instead, they argued that they did not have an anticompetitive nature. *British Sugar* at 29.

⁴⁷⁷ *British Sugar* at 54.

⁴⁷⁸ In *British Sugar*, this company had started a price war, thus informing the other competitors of their future prices was a signal pointing toward the end of such war. The problem is that in this case the particular circumstances have been left in a second place by subsequent case law to such a point that actual reading of *British Sugar* can be one saying that even (all) unilateral communications can lead to an information exchange.

⁴⁷⁹ (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* “*In fact, the problems with the causality presumption, and the presumption of joint conduct following an exchange of future prices, are exacerbated because these exchanges are also characterized as a restriction ‘by object’.* In our view, combining these presumptions while eliminating the requirement that the Commission must show effects of conduct it believes to be anticompetitive reverses the burden of proof to an unacceptable extent”.

Authorities with a flexible and bendable concept almost perfectly suited for any anti-competitive conduct.

In *T-Mobile*, both the European Commission and the Courts have gone as far as to argue that depending on the facts of the case, the finding of a concerted practice - that infringes competition law by object - cannot be excluded also in a case which concerns a single (self-standing) information exchange.⁴⁸⁰

This raises an obvious contradiction: if an information exchange - as a self-standing infringement – refers to a preliminary step before collusion, how is it possible that it is punishable as harshly and as promptly as the classic example of collusion, a hard core cartel?

a) The judgment

In this case, in 2001 the main five Dutch mobile telephone operators held a meeting during which they discussed – on top of other legitimate questions that did not transcend⁴⁸¹ – the reduction of standard dealer remunerations for postpaid subscriptions on or about 1 September 2001. The issue was not so much the fact that a reduction was going to take place – which seemed to be known in the market⁴⁸² - but the date, extent and the conditions under which the reduction would be implemented.

On the basis of this single meeting and the fact that the companies did in fact reduce their dealer remunerations, the ECJ concluded that:

⁴⁸⁰ Building on the *T-Mobile* where The Court of Justice was asked, on a preliminary reference, to consider the nature and operation of the Anic presumption in. The Court referred to what it had said in paragraph 121 of its judgment in *Anic* and held: “59. *Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.*” The Court further held that what matters is whether the participating undertakings were afforded: “61. (...) *the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.*”

⁴⁸¹ According to paragraph 55 of the judgment the meeting had a “legitimate purpose”.

⁴⁸² See *T-Mobile op. cit.* para 68 of the AG’s opinion and para 41 of the judgment.

*“an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object, and that extends to situations, such as that in the present case, in which the modification relates to the reduction in the standard commission paid to dealers.”*⁴⁸³

The Court did not rule whether an infringement had occurred since the ruling was answering a preliminary reference requested by the Dutch Courts. Nonetheless, the Court’s reasoning in T-Mobile contains two important policy allowances for the European Commission.

First, the consecration of the presumption of anticompetitive nature of all information exchanges.⁴⁸⁴ This interpretation – which follows the AG’s opinion – seems, in our view, too broad and dangerous to have been formulated in those terms, particularly, when it does not reflect the mainstream economics on information

⁴⁸³ See *T-Mobile op. cit.* It is interesting to compare this case, with previous case law in *Sarrió* (C-291/98P, *Sarrió v. Commission*, [2000] ECR I-09991) paras. 33 to 40 where the Courts had been much more cautious arguing that the Commission had shown the connection between the information exchanged (which concerned catalogue prices) and the final prices, even though the concertation took place only at catalogue prices “According to the appellant, as the Commission imposed a single fine in respect of all the alleged infringements, that fine should have been reduced if it had been proved that the appellant had been fined in respect of acts which it had not committed. The Court of First Instance, however, which merely considered the distinction between direct and indirect concerted action on prices charged, did not find it necessary to consider whether there was evidence relating to the transaction prices and, accordingly, did not verify whether the scope of the infringement committed by the appellant was in fact more restricted than asserted by the Commission (...) following that examination, the Court of First Instance concluded that the infringement in question consisted in concerted action on the fixing of list prices, but that this concerted action was intended to obtain an increase in invoiced prices (paragraph 53 of the contested judgment), the impact of which was acknowledged by the appellant at the hearing (paragraph 57 of the contested judgment). As the Court of First Instance correctly stated in paragraph 57 of the contested judgment, ‘[T]he fixing of uniform list prices agreed by the producers would have been rendered absolutely irrelevant if those prices had not actually had any effect on transaction prices.’”

⁴⁸⁴ “a concerted practice pursues an anti competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.” *T-Mobile* para. 43.

exchanges, but rather the general policy on hard core catels. The Court should have stressed and remembered the cautions made by the ECJ in the UK Tractor case.⁴⁸⁵

Secondly, that a mere meeting might suffice to reach a collusive outcome.⁴⁸⁶ In this regard, even though the Court placed some emphasis on the structure of the market, the Court should have been more careful in its wording as it might be construed as saying that in tight oligopolistic markets a single meeting suffices. When according to economic theory there are many variables, not just structure, which should be taken into account to assess the likelihood of one example of indirect evidence having collusion as the only valid explanation for their occurrence.

As some voices have pointed out, this presumption raises empirical and legal concerns. Even if one single meeting could at best help reach a focal point, it seems difficult to believe that the dynamics of the infringement and the monitoring could be sustained on the medium term with just one contact.⁴⁸⁷ Moreover, this interpretation seems too far of a stretch of the term concerted practices. Indeed, even if it can be seen a very sensible solution from a policy perspective, it is hardly reconcilable with the current understanding of the concept of a ‘concerted’.⁴⁸⁸

In this regard, some authors have argued that in *T-Mobile*, similarly to the *Bananas* case (discussed later on), the Court was dealing, in fact, with a cartel whose framing as an information exchange/concerted practice did only obscure the legal points at issue.⁴⁸⁹

⁴⁸⁵ See the quotation of the *UK tractor* op. cit.

⁴⁸⁶ “Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the Treaty. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.” *T-Mobile* at 59.

⁴⁸⁷ (Ossowska, 2010) op. cit.

⁴⁸⁸ (Wagner-von Papp, 2012) op. cit.

⁴⁸⁹ (Meyring, 2010) op. cit.

The criticism merits some value not only from a theoretical point of view (it would then make sense applying the previous case law) but also from a purely linguistic aspect; nowhere in the preliminary reference questions the words “information exchange” were raised.⁴⁹⁰

In any event, the Court of Justice takes the view that what matters is not so much the number of meetings held between the participating undertakings, but whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors, in order to determine their conduct on the market in question and **knowingly substitute practical cooperation between them for the risks of competition**. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.⁴⁹¹

The exact meaning of these statements, constantly repeated in the case law, is something which still escapes our full comprehension.

b) A critical review of T-Mobile

T-Mobile clearly shows the theoretical limitations of Article 101 TFEU, given the inability of the Courts to differentiate the general clause and the administrative offence.

The Commission and the Courts have reached a dead end, where they see themselves incapable of sanctioning or prohibiting purely unilateral behavior (other than the decisions of associations which in essence are collective).

⁴⁹⁰ (Meyring, 2010), (Gebrandy, 2010), Loozen, E. "The Application of a More Economic Approach to Restrictions by Object: No Revolution After All." 31 *E.C.L.R.* 4, 2010: 146-150.

⁴⁹¹ *Bananas* at 369.

That is the reason why the European Commission and the European Courts have developed a case law that, to our mind, stretches the concepts of reciprocity and concertation beyond any reasonable interpretation.⁴⁹²

The Court's statements in *T-Mobile* are too broad and should be applied very restrictively.⁴⁹³ In fact, in our opinion, the objective infringement of competition law is dubious absent a clear theory of harm.

For example, in economic terms T-Mobile was not very dissimilar from a joint purchasing agreement for the services provided by dealers.⁴⁹⁴ Acting in concert, the telephone companies ensured a decrease in costs that ultimately could translate into a decrease in the cost of subscriptions for consumers. Why was not this pro-competitive? The response, as already implied, is because it simply was a cartel case: a cartel to determine the price of handsets.⁴⁹⁵

The limitations of Article 101 TFEU, as currently interpreted, become even clearer when one realizes, following *T-Mobile's* reasoning, that unilateral information disclosures today either infringe Article 101 TFEU by object or do not harm it all.

Put it differently, either it was an infringement by object or it was nothing, there was no possibility for a middle ground, given the Court's case law described in the preceding pages.

However, from our review of the economic theory, we know that the line between a unilateral disclosure of information that it is merely an invitation to collude, a unilateral disclosure that might show that the parallel behavior responds to tacit

⁴⁹² This conclusion is key as it sets the basic advantage of an invitation to collude doctrine: it can reestablish the meaning of concertation, as we will demonstrate later on.

⁴⁹³ (Meyring, 2010) *op. cit.*

⁴⁹⁴ In 1998, the Commission exempted EUDIM's information Exchange because its members were seeking to strengthen their bargaining power vis-à-vis their supplies to obtain the lowest purchase prices. See Commission's Notice pursuant to Art. 19(3) of Regulation 17 (case N°. IV/33.815, 33.842 – EUDIM) in O.J. 1996, C 111/8. Also (Capobianco, 2004) *op. cit.* at 1254.

⁴⁹⁵ Apparently, even though it is not expressly acknowledged in the judgment, the commissions were used by dealers to do rebates on the prices of handsets, therefore, operators were acting in concert to alter the price of such handsets. (Gebrandy, 2010) *op. cit.* and (Faull & Nikpay, 2014) *op. cit.* page 999.

collusion, and a unilateral disclosure that brings a cartel into life is a very blurred one.⁴⁹⁶

In other words, what makes *T-Mobile* particularly dangerous is that the lack of a proper dogmatic of Article 101 TFEU, coupled with an absence of properly critical utilization of precedent, makes that these intermediate categories – the grey zone of interdependence in oligopolistic industries - fall invariably between one extreme or the other.

In fact, a broad understanding of *T-Mobile* implies that invitations to collude can be sanctioned as infringements by object even if they do not concern prices or quantities (just decreasing uncertainty as to the commercial policy of a competitor)⁴⁹⁷ since the burden of proof of lack of concertation shifts to the recipients of the information.⁴⁹⁸

This is yet, another example, of the merits of our theory. There is room for a legal exegesis of those conducts that lay on the grey zone of oligopolistic interdependence: to distinguish the application of the general principle from the application of specific rules.

This way, Competition Authorities can correct behaviors without being subject to the scrutiny that should be applied by a Court of law reviewing a quasi-criminal sanction. Moreover, this theory can allow concertation to regain its logical reciprocal meaning.

⁴⁹⁶ In this regard, it is very interesting to oppose EU competition law with U.S. antitrust law where information exchanges, in principle, can fall under 5 categories: favorable opinions, information sharing under Section 5 of the FTC Act, invitations to collude under Section 5 of the FTC Act, information exchanges under a rule of reason interpretation of Section 1 of the Sherman Act, information exchanges as ancillary to a (a cartel) per se infringement of Section 1 of the Sherman Act. DOJ & FTC. Statements of Antitrust Policy in Health Care. 1996. (DOJ & FTC, 1996) OECD. "Unilateral Disclosure on Information with Anticompetitive Effects." *Working Party No.3 on Co-operation and Enforcement*, 2012, Hovenkamp, H. "The Federal Trade Commission and The Sherman Act." *Florida Law Review*, Vol. 62, 2010.

⁴⁹⁷ This is the problem that arises if we confront *T-Mobile* legalistic approach to information exchanges with the more economic or effects based approach of the Horizontal Guidelines.

⁴⁹⁸ *T-Mobile op. cit.*

c) *The dangers arising out of T-Mobile: some national examples*

Even though the distinction between information exchanges as concerted practices or agreements might seem irrelevant given the ECJ case law,⁴⁹⁹ it does carry relevant consequences: it helps us understand better the frontier between cartels (created through an information exchange) and self-standing information exchanges and the uncertainty that surrounds information exchanges.

In our opinion, the national cases explained before in section I.3, illustrative a sensitive policy approach to (self-standing) information exchanges where the willingness or negligence of the parties (culpability) is difficult to assess given the mixed-effects they have on the market.

Having said that, we must acknowledge that the flip side of the coin is that information exchanges agreements might be labelled to promptly as cartels, even when they are self-standing behavior. In other words, because the current interpretation of Article 101 TFEU neglects the ability to encapsulate the grey intermediate zone within the Treaties, cases might fall under the wrong extremes.

In our opinion, there are two obvious reasons for such behavior by young Competition Authorities: first, to ensure that leniency programs gain traction, many leniency applicants might inform about behavior which falls even though collusive or facilitating falls sort of being labelled a cartel and, secondly, the lower burden of proof attached to object infringements.⁵⁰⁰

The decision of the Spanish Competition Authority in the *Fluid Pumps* and the counter of the Supreme Court in the *Basque Saving Banks* cases provide a very good example in this regard.

⁴⁹⁹ Given the case law of the European Courts that allows agencies to frame infringement as “*an agreement and/or a concerted practice*”

⁵⁰⁰ Sharing these views Valdés Burgui, A. "Intercambios de Información entre Competidores y su Posible Calificación como Cárteles." In *Problemas Prácticos y Actualidad del Derecho de la Competencia*, by M.A. Recuerda Girela, 368. Pamplona: Civitas, 2014.

In the Fluid Pumps case,⁵⁰¹ the Spanish Competition Authority fined several companies as well as the Spanish Association of Fluid Pump Manufacturers with 18 million for participating in two distinct anti-competitive practices.

First, the coordination between competing undertakings in the fluid pumps business, with the collaboration of the AEFBF, in order to fix the terms of trading with their customers from 2004 until at least the time when the inspections took place. The Council took the view that this conduct constituted a breach of article 1.1.a) of the Competition Act and article 101 of the Treaty on the Functioning of the European Union and that, given the variables in which it occurred and the structure adopted by the agreements, this breach should be treated as a cartel.

Secondly, the Quality Model for fire-fighting equipment adopted by a series of undertakings within the Association, along with the Rating Procedure designed on the basis of that Model, contained clauses that restricted competition and were capable of hindering competition on the market for fire-fighting equipment, hence they amounted to a practice prohibited by article 1.1 of the Competition Act and article 101 of the Treaty on the Functioning of the European Union.⁵⁰²

The particularly interesting part of this decision is that the Competition Authority found that the information exchanges amounted to a cartel by quoting T-

⁵⁰¹ Bombas de Fluidos, S/0185/09, Decision of 24 June 2011.

⁵⁰² The Authority considered that the exchanges of information on future price increases had to be analyzed together with the meeting of the minds to determine the main terms and conditions of the agreements with clients. *“Desde el punto de vista de su calificación jurídica, las conductas descritas desarrolladas en el seno de la AEFBF caen en el ámbito de aplicación del artículo 1 de la LDC y del artículo 101 del TFUE. Existe un concierto de voluntades plasmado en diferentes acuerdos que tienen una naturaleza restrictiva de competencia. En lo que se refiere a los acuerdos de fijación de condiciones generales de venta, su objetivo es claramente restrictivo de la competencia. Las empresas acuerdan homogeneizar variables que suponen parte del coste efectivo de la transacción, tales como el plazo de pago, el plazo de garantía, el coste de los avales durante el periodo de garantía, las condiciones de entrega del producto o los conceptos que deben ser facturados de manera autónoma, como la puesta en marcha o el almacenamiento.[...] “En lo que se refiere a los intercambios de información acreditados, el Consejo concluye que no procede calificarlos de infracción autónoma, sino que forman parte de la misma infracción que la fijación de condiciones generales de venta”.* A similar argument was provided in the Xerez Wines case (S/0091/08) *“En un caso de cártel como el que nos ocupa, la conducta no es el intercambio de información, éste es solo un instrumento, por tanto no puede aceptarse, como alega LUSTAU, que los intercambios de información en el caso presente no cumplen los requisitos establecidos por la jurisprudencia comunitaria para que sean considerados aptos para distorsionar la competencia, citando el caso de los tractores”.*

Mobile, without a real analysis of the information exchanged, its quality, its ability to have an impact on the competitors' behavior and without studying the structure of the market.⁵⁰³ Surprisingly, the decision was upheld by the Spanish High Court with a legalistic interpretation of the case law of the ECJ.⁵⁰⁴

In this context, the Basque Savings Banks decision of the Spanish Supreme Court is an important admonishment to the Spanish Competition Authority.⁵⁰⁵ In this case the Court upheld the first instance ruling that concluded that the information exchange as to the general conditions was an autonomous infringement whose effects on the market had to be tested and that the presumption of illegality arising out of the infringement "by object" of fixing prices and sharing markets (which had occurred) could not be extended to this infringement.⁵⁰⁶

⁵⁰³ Pérez Olmo, G. "Comentario Crítico de la Resolución de la CNC de 24 de Junio de 2011, Bombas de Fluidos." In *Problemas Prácticos y Actualidad del Derecho de la Competencia*, by M.A. Recuerda Girela, 368. Pamplona: Civitas, 2014.

⁵⁰⁴ SAN February 5, 2013 (Id. Cendoj: 28079230062013100060) "*Se trata, a juicio de esta Sala, de una conducta apta para falsear la libre competencia. El Tribunal de Justicia ha declarado que constituyen una conducta contraria al Tratado y condenado por ser contrarios a la libre competencia no solo los intercambios de información sino la mera entrega o recepción de información en una reunión, puesto que tiene el mismo impacto: eliminar la incertidumbre entre los competidores sobre cual va a ser su futura conducta (asunto T-28/99 Sigma Technologie)*". [...] "*En cuanto a la falta de objeto anticompetitivo, la jurisprudencia nacional y comunitaria ha reiterado que lo relevante es la "aptitud" para restringir la libre competencia, y en este caso, no cabe duda alguna de que los intercambios de información litigiosos, como señala la Administración pueden facilitar el alineamiento de comportamientos que debían ser competitivos.* [...] "*La Sala considera que la calificación de las conductas enjuiciadas, las constitutivas de la primera infracción litigiosa, en lo que es objeto de enjuiciamiento en este recurso, específicamente la consideración como cártel de estos intercambios de información es conforme a derecho, tanto en lo que respecta la art. 101 TFUE como al artículo 1 LDC* "

⁵⁰⁵ (Pérez Olmo, 2014) *op. cit.*

⁵⁰⁶ "*Estos dos acuerdos, de reparto de mercado y de fijación de precios, tienen por objeto, restringir la competencia, y sin necesidad de ninguna acreditación sobre sus efectos, según hemos razonado anteriormente, deben considerarse acuerdos anticompetitivos prohibidos por el artículo 1 LDC.* [...] *Por el contrario, en relación con los demás acuerdos que se incluyen en la narración de hechos probados de la Resolución impugnada, de coordinación de actuaciones frente a terceros competidores, intercambio de información, coordinación y fijación de posturas comunes en sociedades participadas, y coordinación de actuaciones en relación con nuevos productos o sectores de actividad (acuerdos 3, 4, 5 y 6 de los enumerados en el Fundamento Jurídico 5), no puede presumirse que tengan por objeto, por su naturaleza, infringir la competencia, de acuerdo con las criterios jurisprudenciales del TJCE y Directrices de la Comisión Directrices de la Comisión sobre la aplicabilidad del artículo 81 del Tratado CE a los acuerdos de cooperación horizontal (DOCE 2001/C - 3/02) y las Directrices relativas a la aplicación del apartado 3 del artículo 81 del Tratado (DOCE 2004/C - 101/08), previamente citadas, que como se ha visto extienden la presunción de ser restrictivos de la competencia por su objeto únicamente a los acuerdos de fijación de precios, limitación de la producción y reparto del mercado* "

Similarly, the ECJ ruling in *Cartes Bancaires* provides for a reasonable application of Article 101 TFEU as a rule in conformity with the harm principle and opposed to *T-Mobile*.⁵⁰⁷

K. Information exchanges as infringements by object or effect

Once we have seen how our theory provides for a reasonable and clearer explanation to the agreement and concerted practice divide regarding information exchanges, it is time to move to the “effects” of the conduct.

According to the Courts, the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that “*certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition*”.⁵⁰⁸

This distinction – which originates in *Société Technique Minière*⁵⁰⁹ and it is also presente in *Consten*⁵¹⁰ - carries significant consequences in terms of the burden of proof that the Competition authorities need to meet since, in deciding whether an “*agreement or concerted practice*” is prohibited by Article 101(1) TFEU, there is no need to take account of its actual effects “*once it is apparent that its object is to prevent, restrict or distort competition within the common market*”.⁵¹¹

The object category has always been a contentious issue. As it is well known, the Commission’s view on the matter is that restrictions of competition by object are

⁵⁰⁷ See footnote 611 and accompanying text.

⁵⁰⁸ Case C-209/07, *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 17 (“BIDS”).

⁵⁰⁹ See footnote 517.

⁵¹⁰ See footnote 167 and accompanying text.

⁵¹¹ See, to that effect, Joined Cases 56/64 and 58/64, *Consten and Grundig v Commission* [1966] ECR 299, 342; Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraph 125.

those that experience demonstrates are likely to produce negative effects on the market and to jeopardize the objectives pursued by the EU competition rules.⁵¹²

According to the Courts, in order to determine whether conduct is —by its very nature injurious to competition or anticompetitive in nature (restrictive by object), —regard must be had, *inter alia*, (a) to the content of its provisions, (b) the objectives it seeks to attain and (c) the economic and legal context of which it forms a part.⁵¹³ The intent of the parties is, therefore, of secondary importance in this type of infringements.⁵¹⁴

The “object”, therefore, is not set by the parties but rather is intrinsic to the behavior of the parties. If a bus driver purposely speeds up beyond the speed limit, he is committing an infringement, even if there is no accident and even if he was not aware of the speed limit. In other words, these infringements are “*objective*”.

One of the biggest issues surrounding object infringements is that this presumption is based, in principle, on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and - also and very importantly - “*to jeopardise the objectives pursued by the Community competition rules.*”

⁵¹² (Commission, Guidelines on the application of Article 81(3) of the Treaty, 2004) para 21 “*Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.*” More recently, Italianer, A. “Competitor Agreements under EU Competition Law.” *40th Annual Conference on International Antitrust Law and Policy*. New York: Fordham Competition Law Institute, 2013. In recent years, the rulings of the ECJ in the preliminary references in the BIDS (C-209/07), Expedia (c-226/12), Slovak Banks (C-68/12) and Allianz Hungary (C-32/11) are very insightful in understanding the ECJ’s approach to this type of infringement.

⁵¹³ Jones, A. “Left behind modernisation? Restrictions by Object under Article 101(1).” *European Competition Journal*, 2010.

⁵¹⁴ Indeed, as explained by the General Court, it should be borne in mind in this respect that “*the parties’ intention is not a necessary factor in determining whether a concerted practice is restrictive, but that there is nothing prohibiting the Commission or the Courts of the European Union from taking that aspect into account*” *Bananas* at 413.

However, as it is well known whether these types of infringements do actually exist and what exact type of infringements fall under this category has been a hotly debated issue.⁵¹⁵

As Professor Jones reasons, it appears after *T-Mobile* the category applies not only to specific restraints that experience shows, in the light of the objectives pursued by the EU competition rules, are likely to be anticompetitive, but also to other arrangements whose anticompetitive nature is apparent from the objective it pursues and/or the context in which it operates.⁵¹⁶

As already explained, the root of the problem might be that the object and effect boxes were not created by the legislator as different categories of an administrative sanction but, rather, as a way to ensure a broad reading of the general prohibitive principle which has not been appropriately developed through legal rules.

This problem has been exacerbated by the lack of proper analysis of *Société Technique Minière*, the leading case on the distinction, which was decided on a case

⁵¹⁵ (Jones, Left behind modernisation? Restrictions by Object under Article 101(1), 2010) *op. cit.* (Gebrandy, 2010) *op. cit.* distinguishes between hard-core restrictions and infringements by object, arguing that hard-core restrictions are a subset within object infringements.

⁵¹⁶ (Jones, Left behind modernisation? Restrictions by Object under Article 101(1), 2010) *op. cit.* The new economic approach (effects based approach) has certainly not helped in clarifying the meaning of object infringements, on the opposite it has raised issues as to whether the categories of object infringements should be revisited and as to the interplay between Articles 101.1 and 101.3 be interpreted. It is unclear to what extent Article 101(3) applies in infringements by effect. In *Métropole Télévision v. Commission*, the General Court when considering the type of analysis that needed to be carried out under Article 101(1) affirmed: “It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article [101(1)] of the Treaty (...). Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article [101(1)] of the Treaty. In assessing the applicability of Article [101(1)] to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned). See T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v. Commission of the European Communities*, [2001] ECR I-2459, para. 74 and seq.

concerning just Article 85.2 (voidness) and not an administrative sanction and where such distinction made perfect sense.⁵¹⁷

The object and effect categories do not reflect different rules that are forbidden, they just clarify that competition can be endangered and harmed, which is something very different from explaining how it can be endangered or harmed, or what types of dangerous situations should not be allowed at any cost.

Our theory provides a clear solution to the ambivalent effects or objectives of an information exchange: to stop labelling all these conducts as information exchanges and instead be more intellectually honest about what they truly are and which specific rules they infringe.

As we hope to have demonstrated, there cannot be self-standing information exchanges which are infringements by object if they are not a hard core cartel.

This, in turn means, that all pure information exchanges (facilitating practices which we want to treat as autonomous conducts) should be prohibited and not sanctioned because there is not sufficient evidence as to their effects as to develop a proper rule of the kind that Article 103 TFEU demands.

The problem, as we have seen is that the current interpretation of Article 101 TFEU does not allow developing such clear rules, because it keeps trying to encapsulate the entire competition law universe in four words: “agreement and concerted practice” and, particularly,” object and effect”.

⁵¹⁷ C-56/65 - *Société Technique Minière v Maschinenbau Ulm*, ECR 235 (1966), at 249 “Finally, for the agreement at issue to be caught by the prohibition contained in Article 85 (1) it must have as its 'object or effect the prevention, restriction or distortion of competition within the Common Market'. The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article 85 (1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent

The Authorities have not helped either as there is no single normative definition of a cartel in EU competition law, despite being the most clear antitrust infringement. We explain this further next.

1. Information exchanges, cartels and infringements by object

The term “cartel” is not expressly acknowledged in the Treaties. The European Commission currently defines a cartel as “*a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.*”⁵¹⁸

Whereas in 1998, the OECD defined a “hard core cartel” as “*an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce*”.⁵¹⁹

The Spanish Law on the Defense of Competition in its 4th Additional Clause defines it as “*all secret agreements between two or more competitors whose object is the setting of prices, production or selling quotas, sharing of markets, including bid-rigging or the restriction of imports or exports*”.⁵²⁰

⁵¹⁸ According to the European Commission’s website, see at <http://ec.europa.eu/competition/cartels/overview/>

⁵¹⁹ Recommendation of the Council concerning Effective Action Against Hard Core Cartels, 25 March 1998 - C(98)35/FINAL.

⁵²⁰ “*Se entiende por cártel todo acuerdo secreto entre dos o más competidores cuyo objeto sea la fijación de precios, de cuotas de producción o de venta, el reparto de mercados, incluidas las pujas fraudulentas, o la restricción de las importaciones o las exportaciones.*” Spanish Law on the Defense of Competition (Ley 15/2007, de 3 de julio, de Defensa de la Competencia).

Historically, cartels have been identified as the paradigm of object infringements; however, neither the Commission nor the EU Courts has provided a clear list of infringements by object.⁵²¹

The Commission's Fining Guidelines of 1998 provided a list of very serious infringements which indirectly provide guidance as to what types of Commitments could be considered infringements by object, those were “*horizontal restrictions such as price cartels and market sharing quotas, or other practices which jeopardize the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly*”.⁵²²

A similar concern can be found in the current 2006 Guidelines which point out that Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature are among the most harmful restrictions of competition and “*as a matter of policy, they will be heavily fined.*”⁵²³

As we have explained above, in *Hüls* the EU Courts pointed that concerted practices could be in principle infringements by object.⁵²⁴ In *T-Mobile*, the Court went two steps further by (a) indicating that a single information exchange could amount to an infringement by object and (b) expanding the concept of horizontal infringements

⁵²¹ Probably the closest are the hard core infringements not subject to the “De Minimis” Notice. According to Professor Jones (Jones, Left behind modernisation? Restrictions by Object under Article 101(1), 2010) *op. cit.*, the case law has identified the following restraints to be restrictive by object:

- agreements between competitors to fix prices, limit output or share markets;
- agreements between competitors to reduce capacity;
- information exchanges designed to remove uncertainties concerning the intended conduct of the participating firms and facilitating, directly or indirectly the fixing of purchase or selling prices;
- vertical restraints conferring an exclusive sales territory and protection from sales by others within the territory (absolute territorial protection) or otherwise prohibiting or limiting parallel trade; and
- vertical restraints imposing fixed or minimum resale prices on a dealer (resale price maintenance or RPM)

⁵²² Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C 9/03) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:009:0003:0005:EN:PDF>

⁵²³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF>

⁵²⁴ *Hüls op. cit.*

by object beyond price or quota allocations. In fact, the court ruled, that in order to find that a concerted practice has an anti-competitive object, “*there does not need to be a direct link between that practice and consumer prices*”.⁵²⁵

The Court’s broad statement must be nuanced in light of the facts of the case, where the Court seemed to rule that the remuneration paid to dealers was a decisive factor in fixing, ultimately, the price to be paid by the end user for their cellphone handsets. Nonetheless, such a broad statement opened the door for a looser interpretation of the concept infringements by object.

The ultimate problem with the Court’s ruling in *T-Mobile* is that it ignores economic theory and instead it gives excessive weight to a very obtuse understanding of competition - independent business decision making⁵²⁶ - which was originally used as a conceptual tool to be able to distinguish tacit collusion from parallel behavior,⁵²⁷ and has expanded by way of analogy beyond any logical limits.⁵²⁸ Thus, everything that hinders this dogma becomes “tainted” with an aura of anti-competitiveness that must be rebutted by the undertakings.⁵²⁹

⁵²⁵ *T-Mobile* para. 39.

⁵²⁶ On how this is the wrong approach and it has increased the categories of infringements by object see Alfaro, J. “La prohibición de los acuerdos restrictivos de la competencia.” *Indret*, 2004.

⁵²⁷ Similarly, to the ECJ’s reading of competition in 56-58/64, *Costen v. Grundig*, ECR - 299, where the ECJ ruled that in a vertical agreement between a manufacturer and its supplier with a territorial exclusivity clause: “*It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of Article 85 (1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten) or of the corrections of the criteria upon which the Commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects, can in any way lead, in the face of abovementioned restrictions, to a different solution under Article 85 (1).*”

⁵²⁸ On the dangers of using the analogy in competition law, see (Bork, 1993) page 411.

⁵²⁹ Something almost impossible, unless the parties file a leniency application or publicly reject participating. In other words, the test is not a legal one of culpability but rather an economic one of whether the party did take an action that could seriously destabilize the cartel. This point is explained in (Ghezzi & Maggiolino, 2014) *op. cit.* and seems evident once one reads the ECJ’s ruling in *Solvay*, C-455/11 P, *Solvay v. Commission* at para. 44: “*In that regard, it must be stated that probative data illustrating the competitive nature of the market and, in particular, the decrease of prices during the period concerned cannot suffice, of itself, to rebut that presumption. That data does not of itself make it possible to prove that that undertaking did not take account of the information exchanged with its competitors in determining its conduct on the market. It follows that that data does not of itself preclude the presumption that the concerted action enabled that undertaking to eliminate uncertainties regarding*

The time is ripe now for a critical analysis of *Banana* 's, were the General Court was asked whether there were any differences between information exchanges regarding “future prices” and “price fixing” cartels as to their anti-competitive object. This was, yet again, a cartel case.

2. A critical reading of Bananas⁵³⁰: just a cartel case

This case concerned the telephone communications that took place with regularity between the three main bananas producers over a period of two years the night before, or early on the morning, on the day that each company would list their weekly “reference prices”.⁵³¹

The General Court concluded that the bilateral pre-pricing communications that took place among three banana producers (in a market not considered oligopolistic) where they discussed quotation markets, weather conditions and production quotas (within a system of allocated quotas fixed by the EU) decreased uncertainty surrounding the future decisions of the undertakings concerned on quotation prices, which constitute announced prices, and that concertation on such prices may constitute an infringement by object.⁵³²

The General Court, therefore, ruled that the argument that an exchange of information can constitute a restriction of competition by object only if it forms part

its conduct on the market, so that normal competition might as a result have been prevented, restricted or distorted.”

⁵³⁰ T-588/08, *Dole Food Company v. Commission*, judgment of 14 March 2013 (“*Bananas*”).

⁵³¹ The reference prices were the prices the manufacturers would list to their purchasers but not always or necessarily the final price given the buyer power of the purchasers. See paragraphs 431 to 585 of the judgment.

⁵³² *Bananas* para. 63. Previously, the Court had explained that “*with respect to the infringement referred to in the contested decision, it is unequivocally clear from the terms of that decision that the Commission alleges that the applicants coordinated quotation prices by means of bilateral pre-pricing communications, a situation which characterizes a concerted practice concerning the fixing of prices and therefore having as its object the restriction of competition within the meaning of Article 81 EC (see, inter alia, recitals 1, 54, 261, 263 and 271 to the contested decision); this is not precluded by the fact that the Commission did not find, in the present case, that there had been an agreement or a concerted practice designed to fix actual prices, or an agreement relating to quotation prices, or even an agreement or a concerted practice designed to fix specific price increases or reductions.*” *Bananas* para. 53.

of broader cartel arrangements, such as cartels to fix actual prices or share markets lacked “any foundation in law.”⁵³³

The General Court began its analysis by repeating the idea that the principle of independent business decision making “strictly precludes” any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to “*the normal conditions*” of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.

Even though the reference to “normal conditions of competition” nuances the presumption of anti-competitiveness which “taints” all information exchanges, it does not seem, in our view, the correct parameter as it does not differentiate between the many different competitive and anti-competitive equilibriums that can take place in oligopolistic markets.⁵³⁴

However, despite the language of the General Court suggesting a high degree of deference to the Commission, the General Court pointed out that it was in any event its role to ascertain whether, in the circumstances of the present case, the Commission was entitled to find that the exchanges of information between, on the one hand, Dole and Chiquita and, on the other hand, Dole and Weichert constituted a concerted practice having as its object the restriction of competition.⁵³⁵

⁵³³ *Bananas* para. 59.

⁵³⁴ Similarly, Frazer, T. “Information exchange: don’t slip on the banana skin.” *The In-House Lawyer*, 2013: “*The concept of an infringement constituted by an exchange of information through the medium of a concerted practice by object is disconcertingly wide. One crumb of comfort is that the Court’s view that an exchange of information of the type in issue would be regarded as anti-competitive by object took account of the market context. Infringements are far more likely to arise in a highly concentrated market – whether or not the increased transparency actually did distort rivalry on the market and increase the probability of collusion. But in a fragmented market, an exchange of such information may be neutral, or even pro-competitive. Of course, an exchange that in fact had an anti-competitive effect in a fragmented market would be an infringement by effect, even if not by object.*”

⁵³⁵ *Bananas* para. 66. (Frazer, 2013) *op. cit.*

In fact, the General Court undertook a very thorough and careful analysis of the circumstances of the present case. Nothing less can be said of the 500 paragraphs (paras. 86 to 585 both included) that the judgment devotes to rule on “*the existence of a concerted practice having an anti-competitive object*” (title of section II.A of the judgment).

During those paragraphs the Court assessed, among other aspects, the ability of the information to predict the competitor’s behavior in the market (future rises or decreases), the public or private nature of the information, the legal framework, the functioning of the offer and demand within that framework, the structure of the market, the calendar and frequency of the communications.

At first sight, it seems contradictory that a per se infringement needs 500 paragraphs to explain why it is a per se infringement, when in order for a concerted practice to be regarded as having an anti-competitive object “*it is sufficient that it has the potential to have a negative impact on competition.*”⁵³⁶

After reading the General Court judgment, one reaches the conclusion that the *Bananas* case is not a case of a concerted practice but an implicit agreement for which there was no direct evidence, thus the entire case had to be built on indirect evidence which needed to be interpreted as whole (which is precisely what the Court did in those 500 paragraphs, particularly given the non-oligopolistic nature of the market).

However, given the considerably lower standard of proof that the Courts have required to put forward these types of cases, the Commission felt more comfortable using the information exchange/concerted practice terminology rather than talking about a cartel.⁵³⁷

⁵³⁶ “*In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages*” *Bananas* para. 70.

⁵³⁷ Referring to this case as cartel case, see Herbert Smith. “Information Exchange Remains a Key Competition Law Risk.” *Competition, Regulation and Trade E-Bulletin*, 2013.

This comes back to the issue that all cartels contain an information exchange however not all information exchanges are cartel. Unfortunately, neither the Commission nor the EU Courts have built clear analytical tools to differentiate them. The reason might be that a continuum of facilitating practices can, with all logic, end up in the existence of an implicit agreement.⁵³⁸

The recent ECJ judgment of 19 March 2015, upholding the General Court's views, provides additional light on this conclusion.⁵³⁹ In fact, reading the judgment one gets the impression that the conduct which is sanctioned is not truly a classic hard core cartel but rather the facilitation of the existence of a tacit cartel. We cannot obviate that this was a decision arising from a leniency application.

Instead of agreeing on the final prices, the members of the cartel exchanged the elements that help them align their reference prices which in turn would, probably, help them align their final prices. The ECJ began by pointing out, in the background to the dispute, that the fine had been reduced by 60% given the specific regulatory regime of the industry and the fact that the conduct concerned reference prices and not final prices.⁵⁴⁰ This does not seem an irrelevant remark. In fact, to our mind, it represents that the ECJ might have acknowledged implicitly that the Commission was not sanctioning a fully accomplished conduct but rather the conducts that aided in building up a tacit cartel.⁵⁴¹

In our opinion, the ECJ judgment contains both very positive and very negative statements which result from the need to comingle *Cartes Bancaires* and *T-Mobile* into a consistent case law.⁵⁴² The ultimate outcome – upholding the European Commission decision – might be correct. However, the reference to the case law on

⁵³⁸ (Ossowska, 2010) *op. cit.*

⁵³⁹ C-286/13P, *Dole Food Company Inc. v. Commission*, Judgment of 19 March 2015.

⁵⁴⁰ *Id.*, para. 25

⁵⁴¹ *Id.*, para. 130 “Second, the General Court found, at paragraph 574 of the judgment under appeal, that quotation prices were relevant to the market concerned, since, on the one hand, market signals, market trends or indications as to the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained and, on the other, in some transactions the actual prices were directly linked to the quotation prices.”

⁵⁴² It is quite interesting to compare the statements made by the ECJ in paras. 113 and 115 against 119 and 123.

concerted practices and information exchanges and the independent decision making doctrine (under T-Mobile) does not aid in providing more legal certainty. Instead, the European Courts will be much better off if they extract from this judgment two key aspects pointed out in the judgment by reference to *Cartes Bancaires*: (i) the need for sufficient degree of harm to competition as the key benchmark to sanction conducts⁵⁴³ (principle of harm) and (ii) the idea that this harm can result from direct or indirect actions, therefore, in order to sanction it, it is relevant to determine the intention of the parties when undertaking those conducts (principle of culpability).⁵⁴⁴

3. The need for proper legal rules confirmed

In our opinion, the previous case law confirms our initial intuition, the absence of a proper legal dogmatic exegesis of Article 101 TFEU has resulted in the lack of detailed rules setting forth the principles contained in that Article.

As result, the only rules that actually exist are those contained in subparagraphs a) to e) of Article 101 TFEU, when a conduct falls short of those, for example because it does not fix prices, but a key of its elements (such as it happened in T-Mobile and Banana's), the authorities prefer to resort to the grey zone of concerted practices and information exchanges -even though it might still be clearly cartel (or the preparation or facilitation of one) - thanks to a case law that - paradoxically enough - was developed, precisely, to fight cartels.

This would not be a problem if EU Competition law was applied exclusively by the European Commission. Nonetheless, once the discretion of what conducts should be prosecuted (and under what theories of harm) is also given to the national authorities, the need for proper legal rules beyond Article 101 TFEU becomes evident

⁵⁴³ *Id.* at 113 “In that regard, it is apparent from the Court’s case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (judgment in *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49 and the case-law cited).”

⁵⁴⁴ *Id.* at 130-131 “Second, the General Court found, at paragraph 574 of the judgment under appeal, that quotation prices were relevant to the market concerned, since, on the one hand, market signals, market trends or indications as to the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained and, on the other, in some transactions the actual prices were directly linked to the quotation prices. Third, at paragraph 580 of the judgment under appeal, the General Court found that the Dole employees involved in the pre-pricing communications participated in the internal pricing meetings.”

to ensure the requisite legal certainty that any system guided by the rule of law requires.

L. Information exchanges under Article 101.3

Lastly, we shall pay a short visit to Article 101.3 in relation to self-standing information exchanges. To our knowledge the European Courts have never examined an information exchange case from an Article 101.3 perspective, save for the UK Tractor case (that is before the more “effects-based approach”).⁵⁴⁵ The difficult frontier between Article 101.1 and Article 101.3 TFEU drawn after the modernization process does not certainly help.⁵⁴⁶

The closest approximation to an article 101.3 analysis can be found in the *Asnef-Equifax*,⁵⁴⁷ seen before, however, the Court had pointed out that it was not necessary to study the applicability of article 101.3 TFEU since the information exchange did not have the ability to have an effect on competition given the structure of the market, the fact that all competitors could access the register and that the system did not allow for outsiders to identify the borrowers.

⁵⁴⁵ The closest practical example to the application and interpretation of Article 101.3 by the Commission is the commitment decision in the *Star Alliance* case. In this case, the Commission had challenged the revenue-sharing joint venture between several airlines particularly with regard to the Frankfurt – New York route. In this case, in view of the specificity of the airline sector, the Commission for the first time accepted the so-called “out-of-market efficiencies”. These are efficiencies which are generated on the markets other than the markets where concerns were identified. (Italianer, *Competitor Agreements under EU Competition Law*, 2013). The e-book case, particularly, the Commission’s concern with regards to information exchanges through the MFN clauses would have been a very good candidate to see, the Commission’s 101.3 application in practice particularly given the efficiency rationale of having an additional distributor (Apple) come entering in the e-book market. However, the Commission only indicated in the commitments decision that “*The Commission’s preliminary view is that Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement do not apply in this case because the cumulative conditions set out in those provisions are not met.*”

⁵⁴⁶ Italianer, “A. Fighting cartels in Europe and the US: different systems” *Annual Conference of the International Bar Association*. Boston, 2013. Italianer, A. “Competitor Agreements under EU Competition Law.” *40th Annual Conference on International Antitrust Law and Policy*. New York: Fordham Competition Law Institute, 2013.

⁵⁴⁷ *Asnef-Equifax* para. 65. “*the applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. First, the arrangement concerned must contribute to improving the production or distribution of the goods or services in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; thirdly, it must not impose any non-essential restrictions on the participating undertakings; and, fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products or services in question*”

The Court nevertheless pointed that an article 101.3 assessment would have been pro-competitive.⁵⁴⁸

The *Asnef-Equifax* precedes *T-Mobile* and it shows how the analysis is tainted ex ante. For example, it surprises that nowhere in the judgment there is any reference to *Suiker Unie* and that the Court avoided swiftly the presumption of anti-competitiveness that “taints” information exchanges by pointing out “*while in those conditions such systems are capable of reducing uncertainty as to the risk that applicants for credit will default, they are not, however, liable to reduce uncertainty as to the risks of competition.*”⁵⁴⁹

However, this argument seems to be biased given that one could legitimately argue that the exchange eliminated an element for competition differentiation among financial institutions. Those with the best systems to assess the default risks of their clients would have the best clients and therefore lower default rates.

In this regard, the standard set in *John Deere* precluding any “*direct or indirect contact between competitors, the object or effect is to create conditions of competition which do not correspond to the normal competitive conditions of the market*” could have been met since normal competitive conditions would require competition on the assessment of the default risk of borrower.⁵⁵⁰

We do not pretend to argue that *Asnef-Equifax* should have been decided differently, quite on the contrary. However, this case shows the flexibility and imprecision that the standards set by the ECJ grant to Competition Authorities.⁵⁵¹

⁵⁴⁸ Given that “*under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers. Moreover, as follows from paragraphs 55 and 67 of this judgment, registers such as the one at issue in the main proceedings are, under favourable conditions, capable of leading to a greater overall availability of credit, including for applicants for whom interest rates might be excessive if lenders did not have appropriate knowledge of their personal situation.*” *Asnef-Equifax* paras. 69 and 70.

⁵⁴⁹ *Asnef-Equifax* para. 62.

⁵⁵⁰ *Asnef-Equifax* para. 60.

⁵⁵¹ Here, again, legal dogmatic provides a nice answer to the controversy regarding the application of Article 101.3. Article 101.3 is a balancing test to measure the collusion of principles. Once principles have been developed into rules, they are not balanced what rather excluded by specific clauses. There is no sense in having an exception to a prohibitive rule, because that would be a positive rule.

In this regard, it should not be ignored that Asnef-Equifax concerns a private suit by a Spanish consumer association. The Spanish Competition Authority had blessed the agreement provided that personal data was protected and access to the registered was not discriminatory.

PART THREE - OUR PROPOSAL

VI. A DOGMATIC FRAMEWORK FOR A COHERENT APPLICATION OF ARTICLE 101 TFEU AS AN ADMINISTRATIVE SANCTION

So far, we have seen how, historically and conceptually, there has been much confusion about the scope of application of Article 101 TFEU, particularly, with regards to one infringement (information exchanges) that moves within a fine line between what it is permissible and what is not.

Overtime, particularly after Regulation 1/2003 and the Commission's focus in prohibiting and punishing cartel behavior, monetary fines for competition law infringements have increased considerably.⁵⁵² Today, as it is well known, there is heated discussion about the possible criminal nature of competition law fines.⁵⁵³

The aim of this section is not to conclude whether the application of Article 101 TFEU by Competition Authorities is criminal or administrative in nature. In our opinion, this is not a very productive debate. After all, in *Menarini*,⁵⁵⁴ the ECHR acknowledged their quasi-criminal nature and so have the ECJ judgments in recent

⁵⁵² Connor, J. "Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement." *Purdue Agricultural Economics Working Paper* No. 03-12, 2012.

⁵⁵³ Schweitzer, H. "The European Competition Law Enforcement System and the Evolution of Judicial Review." In *European Competition Law Annual 2009*, by C-D. Ehlermann, & M. Marquis. Oxford: Hart Publishing, 2010.

⁵⁵⁴ European Court of Human Rights, *A. Menarini Diagnostics S.R.L. c. Italie* (Requête no. 43509/08), judgment of 27 September 2011. See also Bronckers, M., and A. Vallery. "Business as usual after *Menarini*?" *MLex Ab Extra*, 2012: 44-46.

cases.⁵⁵⁵ Moreover, continental administrative law scholars have long ago agreed that their sanctioning systems should resemble in, as much as possible, the procedures and guarantees of criminal law.⁵⁵⁶

On the contrary, this chapter is devoted to laying out the basic concepts and principles that should guide from *lege lata* the application of Article 101 TFEU, as an administrative sanction, by the EU Courts.⁵⁵⁷

Our objective here is to incorporate the (continental) criminal law categories into the universe of Article 101 TFEU. In a way, one could say that we will look at competition law with the googles of a criminal law scholar. This will allow us to use the most sophisticated intellectual tools in the analysis of sanctions,⁵⁵⁸ obtaining a new angle of analysis of Article 101 TFEU and most importantly, providing a theory on how to distinguish between the application of the general clause and the application of the administrative rules and sanctions.

This approach to competition law is not novel; in fact, it is inspired by the analogy drawn by AG Kokott, between (criminal) risk offences and competition infringements in *T-Mobile*.⁵⁵⁹

⁵⁵⁵ See, among others, the opinion of AG Kokott, delivered on 12 January 2012, in Joined Cases C-628/10 P and C-14/11 P *Alliance One International Inc. and Others v. European Commission and Others*, para. 111 “Accordingly, although the Commission may, in the proceeding before the General Court, explain in more detail in its defence the reasons for the decision at issue, (65) the Commission may not introduce completely new grounds for the decision at issue in those proceedings. For the original lack of reasons cannot be cured by enabling the person concerned to learn of those reasons during proceedings before the European Union judicature. **This prohibition of adding grounds ‘after the event’ before a court is particularly strict in criminal proceedings and in quasi-criminal proceedings such as cartel proceedings.**”

⁵⁵⁶ For a very good summary of the German, French, Italian and Spanish convergence on this aspect, see (Huerger Lora, 2007) *op. cit.*

⁵⁵⁷ Similarly, (Schwarze & Bechtold, 2008) *op. cit.* “When examined from a substantive law perspective, fining decisions in competition law are presently at least quasi-criminal in nature. To be valid, they must therefore comply with the principles of criminal law and criminal procedure – regardless of whether or not they exceed the boundary drawn in Art. 23 (5) of Reg. 1/2003.”

⁵⁵⁸ A mere look at any criminal law manual shows that many of the issues that trouble competition lawyers today have long been discussed in criminal law, particularly in German criminal law, see Roxin, C. *Derecho Penal. Parte General*. Tomo I. Civitas, 2008.

⁵⁵⁹ T-Mobile: “the prohibition on ‘infringements of competition by object’ resulting from Article 81(1) EC is comparable to the risk offences (*Gefährungsdelikte*) known in criminal law: in most legal systems, a

To that end, we will provide a brief explanation of some key criminal law concepts in the next pages; we apologize in advance if some concepts might seem too obvious for those trained in continental law.

A. Competition as a legally protected value or “Rechtsgutsbegriff”, understanding supra-individual values deserving legal protection and their mechanisms of protection

One of the greatest contributions of the German criminal law scholarship in the study of criminal law has been to identify the link between criminal norms and the values and principles they seek to protect (*Rechtsgüter* in German, *bienes jurídicos* in Spanish).⁵⁶⁰

The classic understanding of criminal law has been, for many years, that behind each crime there should be, at least, a legal (and legitimate) value or principle protected. This theoretical tool has been a key aspect in order to decriminalize certain behaviors and to tailor sanctions in accordance to the values protected.⁵⁶¹ However, as society has evolved and become more institutionalized, so have criminal codes.⁵⁶²

person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.”

The car example has also been used by Director General of DG Comp when explaining infringements by object “*In a way, it’s a bit like speed limits. It is presumed – based on experience – that driving too fast is dangerous, and it is therefore prohibited. That prohibition applies irrespective of whether someone drove safely above the speed limit, whether the offence actually resulted in an accident or whether someone had other, perhaps even laudable motives for driving too fast. It is the mere risk of the presumed danger which triggers the offence*”. (Italianer, Competitor Agreements under EU Competition Law, 2013) *op. cit.*

⁵⁶⁰ Roxin, C. "El concepto de bien jurídico como instrumento de crítica legislativa sometido a examen." *Revista electrónica de ciencia penal y criminología*, 2013, Hefendehl, R. "¿Debe ocuparse el derecho Penal de riesgos futuros?: Bienes jurídicos colectivos y delitos de peligro abstracto." *Revista Electrónica de Ciencia Penal y Criminología*, 2002.

⁵⁶¹ Among others Ferrajoli, L. "El Principio de Lesividad como Garantía Penal." *Conferencia pronunciada en la Real Academia de Jurisprudencia y Legislación*. Madrid, 2008, (Roxin, *Derecho Penal. Parte General*. Tomo I, 2008), *op. cit.* The Spanish Constitutional Court expressed the problem in terms of proportionality. See STC 55/1996 of 28 March 1996 “*Establecida esta premisa, debemos precisar en primer lugar cuál es el bien jurídico protegido por la norma cuestionada o, mejor, cuales son los fines inmediatos y mediatos de protección de la misma. Esta precisión constituye el prius lógico para*

Life, physical integrity, honor, property are examples of values or principles of legal nature which are protected by specific criminal statutes. Homicide, assault, defamation, robbery are, indeed, the crimes created to protect these values.⁵⁶³

Traditionally, criminal law theorists had to deal only with crimes which were individual in nature or, in common law terms, “victim crimes”.⁵⁶⁴ There was always a victim, i.e., a person whose property was robbed, whose life was taken away, whose body was injured.

However, as society matured, legislators moved from pure punishment to protection, and started sanctioning as criminal infringements behaviors which did not protect an individual or its property but, rather, more ethereal, “victimless” or “collective” values such as: the environment, public health or an efficient and trustworthy traffic system.⁵⁶⁵

The concept of collective values is somehow elusive, criminal law academics have acknowledged that in principle it can encompass, at least, two different meanings: on the one hand, those collective rights that just result from the accumulation of individual rights (public health) and, on the other hand, purely supra-individual rights, that is, rights which are beyond individual interests (administration of justice) and which, according to some authors, cannot be understood by reference to an individual right.⁵⁶⁶

la determinación de si el legislador ha incurrido en un exceso manifiesto en el rigor de las penas, vulnerador del art. 17.1 C.E., al introducir un sacrificio patentemente inidóneo, innecesario o desproporcionado del derecho a la libertad; a la par que permite descartar toda posibilidad de sujeción mínima al principio de proporcionalidad si el sacrificio de la libertad que impone la norma persigue la preservación de bienes o intereses, no sólo, por supuesto, constitucionalmente proscritos, sino ya, también, socialmente irrelevantes (STC 111/1993, fundamento jurídico 9º)”.

⁵⁶² We appreciate professor Lascurain’s observations in this regard.

⁵⁶³ Among others (Roxin, Derecho Penal. Parte General. Tomo I, 2008) *op. cit.*, Mir Puig, S. Derecho Penal (Parte General). Barcelona: Reppertor, 2011.

⁵⁶⁴ This is a made-up term, being the truly Anglo-American concept that of “victimless” crimes, which is the closest concept we were able to find.

⁵⁶⁵ (Hefendehl, 2002) *op. cit.* (Ferrajoli, El Principio de Lesividad como Garantía Penal, 2008) *op. cit.*

⁵⁶⁶ (Hefendehl, 2002) *op. cit.* The exact definition is still discussed in criminal law, see Feijoo Sánchez, B. “Sobre la Crisis de la Teoría del Bien Jurídico.” Indret, 2008: 1-16, criticizing the idea of accumulation as

We believe that “competition” is a collective value which is protected by the TFEU. No doubt, that the ultimate concept protected by competition law is a subject of much discussion. In fact, if we were to provide a definition we would say that there is not a clear-cut one in the case law of the ECJ but rather a polyhedron with many different interrogates.⁵⁶⁷ Is about the competitive process or about welfare?⁵⁶⁸ Is it about consumers or about competitors? And if so, what welfare, total welfare or consumer’s welfare?⁵⁶⁹

However, by looking at this case law and the surrounding literature, one soon realizes that the interests that seem to be protected by competition law are normally

relevant. Other authors propose a different distinction, both collective and supraindividual rights anticipate the barrier of protection to values that ensure a proper functioning of the system. However, ones have a more direct relationship with individual rights (public health), whereas others are further away from them (administration of justice). See Gil Gil, A., J. M. Lacruz López, M. Melendo Pardos, and J. Núñez Fernández. *Curso de Derecho Penal. Parte General*. Madrid: Dykinson, 2011, pages 8 to 13.

⁵⁶⁷ Zimmer, D. *The Goals of Competition Law*, Cheltenham: Edward Elgar, 2012.

⁵⁶⁸ The approach in the EU seems to shift between two definitions depending on the case, rivalry between firms or consumer welfare. Director General Alexander Italianer joined both of them nicely in a recent speech when he claimed that “*in its quest to protect rivalry among firms and so the competitive process to promote consumer welfare, the Court takes a broad approach when it comes to concerted restraints on the competitive autonomy of firms that are liable to impede the competitive outcome*” (Italianer, Competitor Agreements under EU Competition Law, 2013). See also Slovak Banks (C-226/12) para. 18 “*Article 101 TFEU is intended to protect not only the interests of competitors or consumers but also the structure of the market and thus competition as such*” as opposed to Allianz Hungary (C-32/11) “*In the light of all of the foregoing considerations, the answer to the question submitted is that Article 101(1) TFEU must be interpreted as meaning that agreements whereby car insurance companies come to bilateral arrangements, either with car dealers acting as car repair shops or with an association representing those dealers, concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depends, inter alia, on the number and percentage of insurance contracts that the dealer has sold as intermediary for that company, can be considered a restriction of competition ‘by object’ within the meaning of that provision, where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.*”

⁵⁶⁹ See (Motta, 2004) *op. cit.* pages 17 to 30. On this topic see also Zimmer, D. "Consumer welfare, economic freedom and the moral quality of competition law - comments on Gregory Werden and Vicotr Vanberg." In *Competition Policy and the Economic Approach*, by J. Drexler. Edward Elgar, 2011, ICN. Competition Enforcement and Consumer Welfare. Conference The Hague, 2011, . (ICN, 2011). (Zimmer, Consumer welfare, economic freedom and the moral quality of competition law - comments on Gregory Werden and Vicotr Vanberg, 2011). Werden, G. "Consumer Welfare and Competition Policy." In *Competition Policy and the Economic Approach*, by J. Drexler. Edward Elgar, 2011, Orbach, B. "The Antitrust Consumer Welfare Paradox" 7 *J. Competition L. & Econ.* 133, 2010, Kaplow, L. "On the Choice of Welfare Standards in Competition Law." *Harvard Law School Discussion Paper* 693, 2011.

collective and organizational, they relate to the adequate functioning of the market or even to consumers as whole, as a group.⁵⁷⁰

As we will explain next there is a connection between supra-individual or collective values and risk offences. Moreover, the case law of the ECJ has favored such a construction of competition law infringement by consecrating the “potential effects” standard of proof.⁵⁷¹

As AG Kokott intuitively acknowledged in *T-Mobile*, competition law infringements are quite similar to protecting road traffic or the environment. If we translate this into offences, we could say that one drunk driver does not threaten the traffic even though it might cause an accident. Letting everybody driving drunk might put at risk the functioning of the traffic system. One small information exchange might not threaten the EU economy; all industries exchanging information among competitors could bring European integration to a halt.⁵⁷²

B. Competition law infringements as a continuum of “endangering” behaviors, the usefulness of the distinction between harm and risk

In general terms, we could say that collective values are generally endangered, whereas individual values are normally harmed. This is obviously a generalization but it helps extract one key conclusion: different values might require different mechanisms of protection, because they are threatened in different ways.

⁵⁷⁰ Otherwise, why are there safe harbors for market participants beyond certain thresholds or *de minimis* rules? Even though it is not the purpose of his paper, reading (Reindl, 2011) *op. cit.* under a criminal lens, one becomes certain that this structural/organizational/collective aspect is one of the most relevant of competition law. Look at the AG opinion in *T-Mobile* “*Article 81 EC forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution). In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared*”

⁵⁷¹ In other words, the protected values are useful as a methodology tool to analyze Article 101 TFEU. Explaining that this is a useful use of the concept but not the only one, see (Roxin, *Derecho Penal. Parte General*. Tomo I, 2008) *op. cit.* page 55.

⁵⁷² (Hefendehl, 2002) *op. cit.*

Criminal law theory has long pointed out that there is a distinction between traditional crimes of harm (i.e. killing) and risk offences (i.e. drunk driving). The first ones could be described as harmful offences (*verletzungsdelikte* in German), while the second ones could be described as danger or risk offences (*gefährdungsdelikte* in German).⁵⁷³

In the last decade, criminal law academics have been particularly interested in these types of risk offences, to such extent, that some authors have labeled this new area in criminal law as the criminal law of the risk ("*Derecho Penal del Riesgo*").⁵⁷⁴

To provide a definition of risk offences is an extremely difficult task, particularly, when one realizes: (a) that it is a purely theoretical construction,⁵⁷⁵ and (b) that even with this category, scholars have singled out also different sub-categories.⁵⁷⁶

In this regard, criminal law theory tells us that there is a consensus distinguishing, at least, three main types of risk offences: abstract risk offences, concrete risk offences and abstract-concrete risk offences.⁵⁷⁷ This last category reflects a somehow mixed option between the two extremes. Not surprisingly, there is a connection between collective (criminal law) protected values and risk offences.⁵⁷⁸

⁵⁷³ (Roxin, *Derecho Penal. Parte General*. Tomo I, 2008) *op. cit.* We use the term danger and risk (and crimes of danger and risk offences) as synonyms as there is not an exact translation of the concept in Anglo-American criminal law. The theoretical constructions and discussions that we will see next are much less frequent in Anglo-American law. A crime is a crime from the moment the legislator has chosen to do so and the theoretical discussion has been for long time limited to the issue of what is the purpose of the sanction.

⁵⁷⁴ Mendoza Buergo, B. *Límites dogmáticos y político-criminales de los delitos de peligro abstracto*. Granada: Comares, 2001, pages 335 and seq.

⁵⁷⁵ There is no such express distinction in the Penal codes since all that matters is whether the action has been embedded into a particular provision.

⁵⁷⁶ (Mendoza Buergo, 2001) *op. cit.*, Cerezo Mir, J. "Los delitos de peligro abstracto en el ámbito del Derecho penal del riesgo." *Revista de derecho penal y criminología*, 2002: 47 - 72. Feijoo Sánchez, B. "Seguridad colectiva y peligro abstracto. Sobre la normativización del peligro." In *Homenaje al profesor Dr. Gonzalo Rodríguez Mourullo*, by AA.VV., 3007-342. Civitas, 2005.

⁵⁷⁷ (Mendoza Buergo, 2001), *op. cit.*

⁵⁷⁸ In fact, and this is an important reflection to keep in mind, depending on the definition of the *Rechts-güter*, the behavior that harms or endangers it significantly varies.

Let's illustrate this point with an example. Killing someone in a car accident because of reckless driving or by poisoning the water he drinks is a homicide punishable by the Criminal code. This is clearly a case of a crime of harm.⁵⁷⁹

However, instead of just preventing this type of crimes and to ensure a safe and reliable transport system or clean waters, the legislator might prefer to widen the breath of the protection of criminal law to crimes which could likely end up in such a fatal result. For example:

- Drunk driving is a case of an abstract risk (*abstraktes gefährdungsdelikte*), the prosecutor will only be required to show that (a) the driver was actually driving and (b) his level of alcohol exceed certain parameters fixed ex ante, or that the driver was actually influenced by the alcohol.⁵⁸⁰

- Reckless driving, on the contrary, is a case of crime of concrete risk (*konkretes gefährdungsdelikte*), the prosecutor will need to show that the actions of the defendant posed a concrete danger to the protect value given, for example: the high speed of the car, the disregard to traffic regulations (changing lanes frequently, using the opposite lane when not permitted, talking on the cellphone or lighting a cigarette just before passing the traffic light on rush hour), jointly with the assessment of danger expressed by other drivers present at the moment in their testimonies, etc.⁵⁸¹

⁵⁷⁹ We borrow this translation into English from Binavince, E. "Crimes of Danger." 15 *Wayne L. Rev.* 683, 1968-1969.

⁵⁸⁰ Obviously that will be the case if the criminal code sets specific parameters, for example based on the level of alcohol in the blood, as the current Spanish criminal code does or if the police can describe certain behavior which shows the influence of alcohol.

⁵⁸¹ In a way, if we look at risk offences as varying scale of actions that get closer to harm an individual or a collective value. Concrete risk offences are at one end of the chain, and it seems almost invariably that they will harm the protected value, even though, exceptional circumstances might make it not happen.

• A hazardous spill could be an intermediate figure (*abstraktes-konkrete gefährungsdelikte*),⁵⁸² while there is an abstract element, that the person spills the product, there is also a concrete element, that the substance is hazardous enough to endanger the environment or the people surrounding it.⁵⁸³

Once the legislators began to prohibit risk offences, criminal law scholars started to justify them under the “tentative theory”. This means that they envisioned risk offences as a mechanism to avoid even attempting to commit another crime. The risk was identified by reference to a crime of harm and the willingness to prevent such a crime pushed the legislator to prevent the attempt (adequate or inadequate) to commit a crime of such harm that it became on itself a crime (a crime of danger).⁵⁸⁴

However this approach was soon replaced by the “probability theory”. According to this interpretation, the “attempt” stage explanation inadequate because it created a *iuris et de iure* presumption of harm (once the attempt is shown, the harm is presumed, that is why there is crime) which would be incompatible with the presumption of innocence.⁵⁸⁵ Instead, they argued that the rationale for these infringements is that the danger is precisely the reason why the legislator has prohibited the conduct. The danger is the *ratio legis* of the provision. The legislator

⁵⁸² (Mendoza Buergo, 2001) *op. cit.*

⁵⁸³ For example, article 325 of the Spanish Criminal Code that reads “*Será castigado con las penas de prisión de dos a cinco años, multa de ocho a veinticuatro meses e inhabilitación especial para profesión u oficio por tiempo de uno a tres años el que, contraviniendo las leyes u otras disposiciones de carácter general protectoras del medio ambiente, provoque o realice directa o indirectamente emisiones, vertidos, radiaciones, extracciones o excavaciones, aterramientos, ruidos, vibraciones, inyecciones o depósitos, en la atmósfera, el suelo, el subsuelo o las aguas terrestres, subterráneas o marítimas, incluido el alta mar, con incidencia incluso en los espacios transfronterizos, así como las captaciones de aguas que puedan perjudicar gravemente el equilibrio de los sistemas naturales. Si el riesgo de grave perjuicio fuese para la salud de las personas, la pena de prisión se impondrá en su mitad superior.*”

⁵⁸⁴ (Feijoo Sánchez, Seguridad colectiva y peligro abstracto. Sobre la normativización del peligro, 2005) *op. cit.* he calls it the “italian” school of thought. Even though there were German authors also defending this approach see (Mendoza Buergo, 2001) *op. cit.* pages 67 and seq. Following Carrara’s concept of the “danger undertaken” “*pericolo corso*”, (Ferrajoli, El Principio de Lesividad como Garantía Penal, 2008) *op. cit.*

⁵⁸⁵ (Bronckers & Vallery, Business as usual after Menarini?, 2012) *op. cit.* and (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.*

has already foreseen that those conducts are ex ante statistically likely to cause harm and, thus, should be prevented.⁵⁸⁶

The discussion on the rationales for punishing abstractly dangerous offences is very useful to our study, as it helps us understand the link between the complexity of competition (as a value that deserves legal protection)⁵⁸⁷ and the categorization of the infringements (rules) incorporated into the black letter law to protect such value.

In general, criminal law scholars are more comfortable when crimes are worded or interpreted as abstract-concrete infringements or concrete risk infringements, rather than as pure abstract risk offences.⁵⁸⁸

In their view, the former demand a suitability test (was the conduct suitable to put the value protected at risk?) before concluding whether a crime has been committed, which fits better within the classic principles of culpability, harm and presumption of innocence.⁵⁸⁹ Moreover, this option allows for a more targeted application of criminal law since it would take into account the abilities of driver, his/her weight and height, the exact amount of alcohol drunk, etc.⁵⁹⁰

⁵⁸⁶ However, in our view, even this construction those not seem to meet the principles of presumption of innocence and culpability since it merely places the presumption at an earlier stage. Other authors have suggested that these behaviors are sanctioned because the wrongdoer has subjectively chosen to disregard a conduct that sets out a minimum degree of care. In our opinion, this comes back again to the idea of experience, since such a rule of care should have been imposed based, precisely, on that common experience of the likely effects of not doing as instructed.

⁵⁸⁷ Its prevention, restriction or distortion according to Article 101 TFEU.

⁵⁸⁸ (Cerezo Mir, 2002) *op. cit.* (Kiss, 2015) *op. cit.*

⁵⁸⁹ (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* “First, the presumption of innocence would seem to discipline the characterization of restriction ‘by object’ as well. That characterization really presumes anticompetitive effects, without this presumption being rebuttable. According to the ECtHR, presumptions should not go further than is reasonably necessary to achieve a public policy goal. Given the lack of certainty surrounding the effects of information exchanges, even on future prices, it seems disproportionate to automatically infer an anticompetitive object, with the procedural consequences this entails for the companies concerned.”

⁵⁹⁰ (Mir Puig, 2011) *op. cit.*, (Muñoz Conde, 2002) *op. cit.* (Kiss, 2015) *op. cit.*

1. Article 101 TFEU under the criminal law lens: a typology of offences

As we know, Article 101 TFEU (as interpreted by the ECJ) distinguishes two types of infringements: infringements by object and infringements by effect.

Infringements by object are, for the European Courts, activities which are per se illegal absent evidence, on the contrary, of countervailing effects. Thus, according to the categories provided above infringements by object are infringements of abstract danger, since the mere conduct suffices to punish the undertaking without the need of showing any (potential) final specific harm.⁵⁹¹

The categorization of the infringements by effect is more difficult. According to the rule of reason analysis, these infringements are neither beneficial nor harmful on an ex-ante analysis. Rather, it is necessary to undertake a case by case analysis of the circumstances surrounding the case to assess its potential consequences.

This rules out purely abstract infringements of danger, but it does not tell us if we can move away from the risk to the harm area. The European Courts provide a partial response through their case law understanding that the term “effects” encompasses both “**actual**” effects and “**potential**” effects.⁵⁹²

Potential effects cases involve circumstances where no specific harm has actually taken place (or been shown) but - taking into account the particular

⁵⁹¹ (Italianer, The Object of Effects, 2014) *op. cit.* “Every time we pursue an investigation we have to decide: is this an infringement of competition law by its very nature, or should we examine possible anti-competitive effects? In the first case we look at inherently harmful infringements. We do this by primarily focusing on the content and the objectives of the agreements or the conduct in question in order to see whether they reveal a sufficient degree of harm to competition. But we don't consider whether in fact they produce negative effects. Such infringements by their very nature are always serious, although not necessarily obvious.”

⁵⁹² (Italianer, The Object of Effects, 2014), *op. cit.* “The *Cartes Bancaires* judgment has only told us what to do and what not to do when analysing infringements by object. The Court did not tell us much what to do when it comes to infringements by effect. But this is pretty clear from previous case law, for instance the case *John Deere*, which tells us that for finding an infringement by effect under Article 101 there is no requirement to demonstrate whether and to what extent concrete effects actually occurred: we legally only have to show, on the basis of a realistic counterfactual, the likely effects of the conduct in question. In some cases the quantitative economic evidence can be very important. But there are certainly also cases in which qualitative analysis can be sufficient to provide the required proof of the likely effects, just as it can be in merger cases.”

circumstances and facts of the case - there are reasons (rule of reason analysis) to forbid the conduct and to believe that they could (have) happen(ed).

On the one hand an actual harm is not necessary to sanction the company, however, on the other hand, a sanction can only be imposed after taking into account the particular circumstances of the market - which make it suitable to harm our legally protected value “competition” at least potentially – these cases could be labelled as abstract-concrete risk offences.

Finally, we are left with infringements by effect with an actual effect. At first sight, it seems plausible to argue that these are infringements of harm since the Competition authorities need to prove an actual result on competition. However, in reality, we believe that these cases probably lay on the frontier between the concrete risk offences and crimes of harm.

Given that the analysis is always based on a counterfactual, (what would competition have looked like, if the allegedly anticompetitive agreement under investigation had never existed?);⁵⁹³ it is quite difficult to determine whether these are cases of concrete risk offences or crimes of harm.

Something which, to our mind, seems quite logical as these infringements move in a continuum of different conducts that move from their unlikely harm (or even procompetitive effect) [some types of information exchanges] to an almost absolute certainty of harm (and, therefore, of dangerousness) to competition [secret hard core cartels].

⁵⁹³ (Italianer, The Object of Effects, 2014) *op. cit.*

Our conclusions are summarized in the following table:

Competition law	Criminal law
Infringements by object	Abstract risk offences
Infringements by effect (potential effects)	Concrete-abstract risk offences
Infringements by effect (real effects)	Concrete risk offences or harm offences

2. The problem of enforcing principles rather than rules

One evident conclusion that can be extracted from the above, when confronted with our review of the case law, is that in competition law there is a continuum of behaviors that can endanger the system and that frontiers between what is punishable and not are irremediably arbitrary. So far, this does not make it any different from any sanctioning system.

However, the lack in competition law of detailed rules - either contained in “black letter” provisions or in a consistent (and effectively monitored) administrative practice - has created a very interesting phenomenon of evolution, which is precisely the opposite of criminal law.

Instead of having conducts which are clearly forbidden through detailed rules and which are later analyzed by Courts and scholars, to determine its limits by reason of the values protected, the mechanisms of protection, and the general principles, all that the Courts and Agencies have is a general prohibitive principle which basically says that competition law can be attacked either abstractly, concretely or through intermediate mechanisms.

In other words, when the ECJ differentiates infringements by object and by effect, the Court is technically categorizing conducts, while in practice it is trying to

compensate the lack of such “rules”. That is why the case law is sometimes so confusing.⁵⁹⁴

As we explained at the beginning of this dissertation, Article 101 TFEU was drafted in open and broad terms because it was conceived as a general prohibition. Article 101 TFEU tells us that everything that harms or endangers competition should be prohibited, but it does not tell us when it should be sanctioned.

Regulation 1/2003, quite wrongly in our opinion, tells us that everything that harms or endangers competition can be sanctioned but it does not tell us how to relate the harm or danger to the quantity of the fine or actually to the necessity of such a fine. It does not provide us any rules.

Our review of the basic tenets of any (criminal) sanctioning system tells us that only those actions that can really threaten the system (again, the organization as a whole) should be punished, even in the absence of this general concrete effects and, in very particular cases, even in the absence of accumulation, provided that there is a sufficient threat to the protected value or to the social conception of the adequate level of protection that such value deserves.

Translating these ideas into competition law means, first, that reality will always be more complex than just a few sentences, and secondly, that we should move away from a literal, word by word interpretation of the Treaty, and begin realizing that only those conducts whose illegality clearly emanates from it, such as hard core horizontal cartels, should be clearly sanctioned.⁵⁹⁵

In fact, from our review of the economic literature, this is the only clear rule in collusion: hard core cartels should be punished. Only clear rules can meet the demands of the principles of culpability, harm and legal certainty.

⁵⁹⁴ In other words, drunk driving is one type of crime, an abstract type of risk of offence, whereas information exchanges on the contrary, can be anything an abstract risk offence, concrete risk offence, abstract-concrete risk offence or even a crime of harm.

⁵⁹⁵ See pointing, in our opinion, in this direction the Opinion of the AG Wahl in C-172/14, *ING Pensii v. Consiliul Concurentei*, opinion of 23 April 2015, paras. 39 and 40. See also his opinion in *Cartes Bancaires*.

C. The limits to the protection of competition: culpability, harm and legality, three key safeguards.

The possibility to prohibit and punish risk offences under criminal law has raised many concerns among criminal law scholars, particularly with regards of the ability of these offences to meet three basic general principles of any sanctioning system:⁵⁹⁶ the principles of culpability, harm and legality.⁵⁹⁷ These principles fit very nicely within our theory.

1. The culpability principle

The principle of culpability is built under the basic premise that anyone that is punished under criminal law must have committed said criminal infringement.⁵⁹⁸ As a corollary of said principle one must be personally responsible of the behavior that violates the penal code.⁵⁹⁹

Traditionally, culpability has been understood either subjectively or normatively.⁶⁰⁰ According to a subjective interpretation, the relevant part of the analysis is whether the defendant was subjectively (consciously) aware of his behavior and its legal consequences. The normative analysis, on the contrary, looks at whether the wrongdoer could have acted in a different manner and chose not to do so.⁶⁰¹

⁵⁹⁶ As Professor Huergo has pointed out the guarantees of criminal law have translated into administrative sanctioning law generally as principles thus allowing for a more flexible approach in their application. See (Huergo Lora, 2007) *op. cit.* page 43 and seq.

⁵⁹⁷ Our goal in the following paragraphs is to briefly sketch these principles, for more in depth analysis see (Roxin, Derecho Penal. Parte General. Tomo I, 2008) *op. cit.*

⁵⁹⁸ (Mir Puig, 2011) *op. cit.* page 123, explaining that the first corollary is the principle of personal liability or “*personnalité des peines*”.

⁵⁹⁹ (Roxin, Derecho Penal. Parte General. Tomo I, 2008) *op. cit.*. Some authors assign the principle of culpability three different roles: first a requirement in order for a punishment to be imposed, secondly, an element in order to determine the exact gravity (length) of the punishment, and thirdly, a limit/safeguard to avoid the imposition of punishments based solely on the result of the conduct. (Muñoz Conde, 2002) *op. cit.* pages 92 and 93. This author focuses in the third function in particular.

⁶⁰⁰ Jescheck, H. "Evolución del concepto jurídico penal de culpabilidad en Alemania y Austria." *Revista Electrónica de Ciencia Penal y Criminología*, 2003.

⁶⁰¹ (Muñoz Conde, 2002) *op. cit.* page 359.

After much debate, the general view nowadays is that this principle must be interpreted as a mix of both alternatives. Thus, in order for a citizen to be imprisoned for infringing a criminal provision, the legal system requires a degree of maturity and consciousness of its behavior, as well as the understanding of the legal consequences of his acts, which is not based on pure individualistic assessment of the wrongdoer but incorporates social conventions as well.⁶⁰²

This mixed approach allows Courts to punish both willing behavior and negligent behavior. For example, a terrorist might hijack a bus to purposely get on an accident and kill several people (i.e. he was aware of his behavior and the illegality of such and he committed it anyways or). However, a bus driver might prefer to sleep in 10 minutes more rather than checking the pressure of the tires before departing at 5:00 in the morning, with the dreadful result that one tire blows up and there is an accident where several passengers die (he neglected his duties with appalling consequences and he was probably aware that by not checking the tires the risks increased).

The principle of culpability as applied to crimes of harm is quite straightforward, we can look at whether the wrongdoer was subjectively and objectively conscious of the possible consequences of his acts, regardless whether or not he desired, expected or foresaw them.

On the other hand, its application to risk offences raises particular problems since we are not dealing with specific and tangible consequences. In other words, there is a general degree of uncertainty that always surrounds risk offences and that to a certain extent is unavoidable, that is precisely why, criminal scholars tend to prefer “concretized” versions of these offences. For instance, two obvious problems that come up are: how do we quantify danger? and, moreover, how do set a standard of danger? After all, we know that people are either risk averse or risk takers but rarely risk neutral and, furthermore, it is highly unlikely that two persons will measure risk in the same

⁶⁰² (Muñoz Conde, 2002) *op. cit.* page 366. Another way to understand culpability is by looking at the flip side of the coin: liability. Only those citizens that understand their acts and their consequences might be liable. This does not mean that a drug addict does not infringe the law when he steals someone under the abstinence syndrome, however, he might not be as liable for his acts as someone perfectly healthy. The same way that a minor, in principle, is not as aware of the consequences of his acts as an adult.

Nonetheless, we should keep in mind that there are two understandings of culpability, as a general principle guiding criminal law enforcement, as a concrete requirement in order to find an infringement.

manner. For instance, in any drunk driver case where there were no casualties, the defendant's lawyer might ask the Court, or the jury, to consider: how much danger did the driver created (when he did not kill anyone) and how aware was he of his acts if he was considerably intoxicated?⁶⁰³

As it happens with the application of general principles, there is no definite answer to these questions. Nonetheless, the principle of culpability provides a very useful rule of thumb for criminal law enforcers. There must be some degree of knowledge (subjective and objective – based on common experience) as to the dangerousness of the behavior before we can punish a particular conduct.

Moreover, there must be a sufficient degree of knowledge of the illegality of the behavior.⁶⁰⁴ In fact, under a protective approach to criminal law, one could say the opposite is true, unless the prosecutor can prove willingness (*mens rea*), one should be deemed not guilty.⁶⁰⁵ Obviously, as with many of the concepts developed so far, we cannot talk about knowledge in yes or no terms, this is rather a continuum.⁶⁰⁶

⁶⁰³ Notice that drunkenness is normally a mitigating factor in most crimes but it is the triggering factor in drunk driving, shouldn't the courts have to address whether the defendant was aware that he was driving and that he was drunk, before addressing any other elements of the crime?

⁶⁰⁴ This brings the concept of the "mistake of the law", known as "*Rechtsirrtum*" in German which acknowledges that even though ignorance of the law is no excuse, there might be circumstances where the wrongdoer might be mistaken about: (a) either one of the elements of the conduct, someone marries another person believing that he or she is single, (b) the illegality of the conduct, a foreigner travels to Singapore and brings chewing gum without knowing that is forbidden in the country, or (c) the existence of cause of exculpation, for example a U.S. citizen from Texas living abroad in Europe might believe that the use of deadly force in the event of trespass ("castle doctrine") might be allowed in all cases and not only in those of imminent peril of death. This mistake or error might, under certain circumstances, allow the wrongdoer to be exculpated or have his liability considerably decreased. Among others see Bajo, M. "El Error de Prohibición en el Derecho Penal Económico." *Bajo - Trallero Publicaciones*, n.d., (Muñoz Conde, 2002) *op. cit.* pages 396 to 402, and extensively, the thesis dissertation Felip i Saborit, D. *La Delimitación del Conocimiento de la Antijuridicidad*. 1997.

⁶⁰⁵ We thank professor Lascurain for this observation.

⁶⁰⁶ It is not the same the knowledge of the consequences, that the knowledge of the potential consequences or knowledge of the potential to behave in such a way that has potential consequences. In other words, it is not the same knowledge that it is required to show a willing intent, than a willing disregard or mere negligence.

2. The harm principle

The principle of harm, in its original English meaning, summarizes a basic common sense principle: everyone is entitled to do as long as it does not harm another one.⁶⁰⁷ The principle, particularly in Continental law, has expanded nowadays to mean that only those conducts that harm the legally protected values (Rechtsgüter) should be punished.⁶⁰⁸

The concept of harm encompasses two different notions. On the one hand, formal harm (*antijuridicidad formal*), the affront to the system as a whole that is caused by anyone who infringes a prohibitive norm. On other hand, the material or substantive harm (*antijuridicidad material*), that is the harm or danger posed on a specific legally protected value.⁶⁰⁹

Again, its application to crimes of harm is quite simple. If you kill someone you harm that person and his right to live. If you try to kill someone and you fail, you attempted to harm him and, therefore, you endangered that value (life) that society seeks to protect, therefore, depending on the degree of danger (whether the attempt was suitable or unsuitable to meet its goal) you should be punished.

In other words, in the crimes of harm, the danger can be measured by reference to the ultimate physical act that harms the values protected by the criminal code, and

⁶⁰⁷ According to John Stuart Mill “*That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others*”, see Harcourt, B. “The Collapse of the Harm Principle Redux.” *Chicago Public Law and Legal Theory Working Paper*, 2013.

⁶⁰⁸ According to Ferrajoli the harm can be articulated in abstract (nobody can be punished for an act that does not offend legal values of constitutional relevance), or in particular terms, (nobody can be punished for act, that even falling within the wording of a criminal provision, does not in the particular circumstances endanger or harm the protected value). (Ferrajoli, *El Principio de Lesividad como Garantía Penal*, 2008) *op. cit.* “*es posible articular el principio de ofensividad en dos subprincipios: el de ofensividad en abstracto, que podría anclarse a la Constitución mediante una formulación del tipo “nadie puede ser castigado por un hecho que no ofenda bienes jurídicos de relevancia constitucional”; y el de ofensividad en concreto, con el cual se podría establecer que “nadie puede ser castigado por un hecho que, aún correspondiendo a un tipo normativo de delito, no produzca en concreto, al bien por éste protegido, ningún daño o peligro”. El primer principio, al consistir en una norma dirigida al legislador, debería formularse en la Constitución. El segundo, al ser una norma dirigida a los jueces, podría perfectamente ser previsto por una ley común. En ambos casos, este principio tiene la forma, que es propia de todas las garantías, de límite o condicio sine qua non de la intervención penal.*”

⁶⁰⁹ (Muñoz Conde, 2002) *op. cit.* pages 304 and 305.

therefore, there is a benchmark to measure the danger. This reference does not exist in crimes of danger which makes it harder to assess the degree of harm that it is necessary in order to infringe the provision.⁶¹⁰

Again, this test does not provide easy answers but it does deliver another useful analytical tool. Danger is not an abstract concept but rather is related to a value which is protected. For example, drunk driving in order to be a criminal infringement might require a considerably high level of alcohol in blood or reckless driving might require some degree of actual or potential adjoining traffic. The same way that the ECJ overruled the GC judgment in *Cartes Bancaires*⁶¹¹ arguing, that the essential legal criterion for ascertaining whether coordination between undertakings involves such a

⁶¹⁰ (Muñoz Conde, 2002) *op. cit.* page 307 “*La distinción entre delito de lesión y delito de peligro tiene razón de ser en relación con bienes jurídicos de carácter individual con un soporte físico material u objeto de la acción (vida, integridad física, propiedad). En este caso, tanto la lesión como la puesta en peligro concreto del bien jurídico son realidades tangibles que deben ser objeto de prueba en el correspondiente proceso penal. Sin embargo, hay supuestos en los que el peligro a que se refiere el delito en cuestión es meramente abstracto y no va referido directamente a bienes jurídicos individuales, sino a bienes jurídicos colectivos inmateriales tales como la seguridad del tráfico automovilístico (cfr. Art 382), la salud pública (cfr. art. 364, 24º), o el equilibrio de los sistemas naturales (cfr. Art. 325). En estos casos se trata de prevenir un peligro general que afecta a la seguridad colectiva y sólo indirectamente a bienes jurídicos individuales, cuya puesta en peligro concreto queda fuera de la configuración típica, aunque en algunos casos se aluda también a la puesta en peligro de estos bienes jurídicos sin especificar si es una puesta en peligro concreta o abstracta (...) Esta doble naturaleza plantea complejos y difíciles problemas interpretativos a la hora de solucionar el nivel de peligrosidad requerido, la conciencia y aceptación que requiere el dolo de peligro y su diferencia con el dolo de lesión (...) Todo ello ha producido una enorme expansión del Derecho penal que se utiliza como un instrumento de intervención en sectores tradicionalmente alejados del derecho penal, pero que cada vez son más importantes en las sociedades modernas, como el medio ambiente, la salud pública o la economía*”.

⁶¹¹ In *T-Mobile*, the ECJ ruled that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, it must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. A few years later, the ECJ took a very different stand on the meaning of infringement by object and its burden of proof. The *CB* case was not a preliminary reference, but the result of an appeal of a General Court judgment upholding a Commission decision sanctioning the *Cartes Bancaires* Grouping.

According to the ECJ, the General Court failed to take into account that the essential legal criterion for ascertaining whether coordination between undertakings involves a restriction of competition ‘by object’ is the finding that such coordination reveals in itself a sufficient degree of harm to competition. Moreover, the General Court had erred in law in holding that the concept of restriction by object did not need to be interpreted restrictively. The ECJ held that the General Court did not set clearly set out the reasons why the measures at issue, in view of their formulas, were capable of restricting competition and did not in any way explained in what respect that restriction of competition revealed a sufficient degree of harm to be characterized as a restriction ‘by object’.

restriction of competition ‘by object’ is the finding that such coordination reveals in itself a **sufficient degree of harm to competition**.⁶¹²

3. Legality and legal certainty

The principles legality and legal certainty are well known in criminal law and basically stipulate that no punishment shall be imposed without a previous provision stating so (*nullum crimen, nulla poena sine lege*) and that no punishment can be imposed if the provision was not clear and understandable (*nullum poena sine certa lege*).

These principles are part of the European Union acquis⁶¹³ and are, to a large extent, incorporated into article 49 of the European Charter of Fundamental Rights.

The debate on the compatibility of Article 101 TFEU, as applied, through Regulation 1/2003 with said principles has been raised many times and dismissed by the ECJ.⁶¹⁴

In our opinion, the interesting aspect of the debate is neither whether Article 101 TFEU meets the test of legality (which it actually does), after all it is a binding provision which tells us that everything that harms or endangers competition shall be prohibited, except when allowed under Article 101.3, nor whether Article 23 of Regulation 1/2003 fulfils it, which it clearly does not.⁶¹⁵

⁶¹² In fact, some crimes even demand that the danger is severe. For example, the case of hazardous spills I of Article 325 of the Spanish Criminal Code explained above.

⁶¹³ “*In that respect it must be emphasized that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis*” Case 117/8, *Könecke v Balm*, ECR 1984, 3291, para. 11. In the *Degussa* judgment, the CFI held that “*the principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of Community law and requires, inter alia, that any Community legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly*” T-279/02, *Degussa v Commission*, ECR 2006, II-897, para. 66.

⁶¹⁴ For a very critical perspective on the compatibility of the current system with said principles see (Schwarze & Bechtold, 2008), *op. cit.*

⁶¹⁵ Following (Schwarze & Bechtold, 2008) *op. cit.* “*contrary to the current decision practice of the CFI, Art. 23 (2) of Reg. 1/2003 infringes the principle of a clear and unambiguous legal basis*”. According to these authors, the infringement of the principle of a clear and unambiguous legal basis can only be

Instead, the relevant question is whether the rules that are extracted from this principle (and its corresponding sanctions) through the Commission's practice, meet the requirements of legal certainty that any sanctioning system requires.

After all, even if classic continental lawyers are surprised by the lack of "black letter rules", this method of law construction based on a general principle, from which more detailed rules are extracted through administrative practice is not that foreign not the Anglo-Saxon systems, where EU law applies equally.

In order to meet such principle of legal certainty, the EU Courts need to apply a more careful approach to the system of precedent and a much more in-depth review of the consistency of the Commission's decisions before acknowledging the existence of rules that can be derived from the above. This is in fact, the normal method of interpretation in administrative law when rules are framed as open provisions (cláusulas abiertas).⁶¹⁶

What is completely against the principle of legal certainty is the fact that only infringing the norm, a party might understand what rules are derived from such general provision, which unfortunately seems to be the current system.⁶¹⁷

remedied by limiting the scope of discretion of the Commission regarding the determination of the amount of fines.

⁶¹⁶ See for example, the description provided by the Spanish Supreme Court, Administrative Section, on the obligations that this principle imposes which include a prohibition against clauses too "open" or too broad or which are subject to interpretation by another norm which is also unclear, STS 2326/2013: "*El Tribunal Constitucional exige taxatividad y certeza de los tipos infractores, requiriendo una descripción precisa de las conductas infractoras, suficiente certeza, taxatividad o claridad en la exposición de la conducta prohibida; comportando la taxatividad un mandato al legislador para realizar el máximo esfuerzo posible que garantice la seguridad jurídica, de manera que los ciudadanos puedan conocer de antemano lo que está prohibido y prever las consecuencias de sus acciones (STC 151/1997), pudiendo vulnerar el principio de tipicidad los tipos infractores con cláusulas abiertas o excesivamente genéricas si configura tipos desorbitados, o la integración de una norma sancionadora en blanco mediante la remisión a otra disposición legal que no exprese con la determinación exigible en lo que consista la infracción (STC 181/2008 y 283/2006).*"

⁶¹⁷ (Schwarze & Bechtold, 2008) *op. cit.* "Furthermore, the objection may be raised that the fining proceedings in European Community competition law have been conducted for almost fifty years now basically without objection, and that the broad legal rules have attained a sufficient rule-of-law character in the course of decades of practice, so that doubts about the required certainty and unambiguity of the sanctioning system are not (or no longer) reasonable. Firstly, this argument can definitely be reversed. The greater the changes in practical application allowed over the decades by that normative system – which applies in principle unchanged –, the more the required legal clarity and certainty of the penalty system can be questioned. It is probably not an exaggeration to state that at the time Art. 15 of Reg. 17

That is why an administrative practice of prohibitive decisions might be necessary before a proper rule is developed.

4. “Concertation” under these principles

As we have seen today, once concertation has been shown, the conduct requirement comes almost invariably. The UK Competition Appeal Tribunal affirmed, for example, in the milk and cheese case⁶¹⁸ that, once concertation has been proven, it is clear from the judgments of the Court of Justice in *Anic* and *T-Mobile* that the evidential burden is on the participating undertakings to adduce evidence to rebut the presumption and establish that their concerted action did not have any effect on their conduct on the market.⁶¹⁹ A burden of proof is considerably high.⁶²⁰

Courts have developed, therefore, a *iuris tantum* presumption of causation that shifts the burden of proof to the defendant.⁶²¹ From a legal point of view, this doctrine seems at odds with the principle of culpability and the quasi-criminal nature of

was adopted, it was by no means conceivable that the fines would reach such (exorbitant) levels under one and the same regime.”

See also, the incorrect approach, in our opinion, of AG Kokkot in C-286/13 P, *Dole Food Company Inc. v. Commission*, opinion of 11 December 2014, para 113.

⁶¹⁸ *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31.

⁶¹⁹ A similar reading of the case law can be found, among others, in (Ghezzi & Maggiolino, 2014) *op. cit.* “*A concerted practice to fix prices exists even independently from the specific market practices that firms undertake after having taken part to strategic inter-firms contacts.*”

⁶²⁰ Case T-235/07, *Bavaria NV v. Commission*, [2012] ECR 226 at 180 “*It is certainly true that both the statements by the managers from InBev and the fact that Heineken did not increase its prices until February 2000 demonstrate that, during the period in question, each brewer pursued its own policy on the market. Nevertheless, even though this finding may show the absence of formal commitments or actual coordination between the brewers, it is not sufficient to prove that the brewers never took into account the information exchanged at the meetings in question in order to determine their conduct on the market as they wished.*”

⁶²¹ As put forward by the General Court in the Bananas case: “*subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period*” *Bananas* at para. 57. Equally, (Bailey, 2008) *op. cit.* Later confirmed by the ECJ in C-286/13P, *Dole Food Company Inc. v. Commission*, Judgment of 19 March 2015.

competition law.⁶²² By forcing the defendant to prove that he has not taken the information into account, the Courts are asking the defendants to meet the standard of a *probatio diabolica*⁶²³ to show that they did something that did not happen.⁶²⁴

Moreover, the individual is presumed to have committed an action that is likely to constitute an infringement, a conjecture that seems to contradict the presumption of innocence that underpins any criminal or quasi criminal proceeding.⁶²⁵

⁶²²Some commentators have argued that the presumption is based more in economic theory as to the factors that can destabilize a cartel, than in legal presumptions. (Ghezzi & Maggiolino, 2014) *op. cit.* “Put differently, a firm that makes its rivals believe that it has subscribed the results of their anticompetitive meeting and that it would act in conformity with them encourages them to act in a way that is harmful to competition, in case in order to deviate from the collusive equilibrium that the rivals will realize”. Nonetheless, they caution that “This argument should not be pushed too far. As a matter of practice, the rule of public distance has been elaborated and enforced in cases of blatant cartels, that is to say, in cases of leniency applications, prolonged parallel practices and complex forms of coordination against those firms that, though clearly benefitting from the collusive equilibrium, argued that they walked on-part in only one or a few of the scheduled conspirational opportunities.”.

In fact, notice how far, the concept of concerted practices has gone. In 1957, the French Secretary of State of Economic Activities appeared before the French Assembly to provide explanations on the functioning of Article 59 bis later mirrored by article 85 TEC:

“L’entente peut résulter d’un contrat écrit mais, par-delà les apparences, il est loisible de rechercher si les pratiques effectivement suivies para les entreprises constituent la manifestation d’une action concertée ou d’une entente au sens de l’article 59 bis de l’ordonnance. Cette recherche s’appuie sur l’examen de la situation de fait du marché du produit considéré. Cette analyse est toutefois poussée assez loin pour ne pas retenir de simples présomptions permettant de conclure à l’existence d’une pratique concertée. C’est ainsi que l’existence d’un tarif commun de vente ne suffit pas à établir une pratique d’entente, si ce tarif n’est pas appliqué en fait et si les conditions de vent de chacune des sociétés productrices ont évolué dans le sens d’une nette différenciation des prix (...) Les pratiques précédentes sont susceptibles d’être condamnées en application de l’article 59 bis, dès lors qu’elles peuvent exercer sur les Prix les effets prévus par le texte”.

Available at http://4e.republique.jo-an.fr/page2/1957_p4569.pdf?q=28+fevrier+1950

⁶²³ An interesting aspect of the debate that has not been discussed into much detail is whether the presumption is substantive or procedural. In our opinion, the ECJ has made clear that this is a substantive presumption in the sense that it is embedded in the concept itself of concerted practices. The issue is relevant for National Competition Authorities as procedural law is national law whereas substantive law is guided by EU law. Dealing with this issue see (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* and (Gebrandy, 2010) *op. cit.* AG Kokott draw a distinction between the standard of proof and the burden of proof in its conclusions, see para 80 of the AG Opinion and footnote 60.

⁶²⁴ Arguing the difficulty in meeting such a high standard, (Bailey, 2008) *op. cit.* and (Faull & Nikpay, 2014) *op. cit.*

⁶²⁵ (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.* (Loozen, 2010) *op. cit.*

In this regard, it is very interesting to point out the final outcome of *T-Mobile*. When the national court received the preliminary judgment: it found that the Dutch Competition Authority had infringed the presumption of innocence, having dealt all too summarily with the defendants' rebuttals to the causality presumption (which the Dutch Court was instructed to apply by the Court of Justice).⁶²⁶

This was certainly a brave decision. On the contrary, the UK Competition Appeal Tribunal in the milk and cheese case considered that this approach is justified by the commercial and economic reality that competing undertakings are likely to take into account how their competitors are planning to behave on the market when determining their own strategy and conduct.⁶²⁷

Moreover, there is an additional question, if the conduct is presumed to take place and to be anticompetitive, when do you determine its degree of “(anti)competitiveness”?

In other words, if concertation is sufficient to build a presumption of anticompetitive conduct, how can you determine if the conduct is anticompetitive by object or by effect?⁶²⁸ At what stage do the authorities need to show the (real or potential) effects of the conduct?

The only answer is that the whole analysis of the legality of the conduct is biased *ex ante*. It is at the very beginning of this chain of presumptions that surrounds information exchanges where the Authority decides whether the infringements is by object or by effect.

⁶²⁶ (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.*

⁶²⁷ *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31. The disclosure of future pricing intentions significantly reduces, and may indeed eliminate, uncertainty as to competitors' future conduct on the market allowing an undertaking to alter its behavior accordingly. As a result of the disclosure or exchange of information, the participating undertakings are likely to behave differently on the market than if they were required to rely only on their own perceptions, predictions and experience of the market. Accordingly, the likely outcome of such an exchange is that the market will not be as competitive as it might otherwise have been

⁶²⁸ Some commentators have argued as to the expansion of the concept by object as a result of *T-Mobile* and the consequent return to a more restrictive understanding in *Cartes Bancaires* see (Latham & Walkins Client Alert, 2014) *op. cit.* and *infra* note 205. This alert deserves particular attention as it belongs to the same law firm that defended *Cartes Bancaires* before the ECJ.

This is where the whole logic of Article 101 TFEU, as currently interpreted, falls into pieces and where the lack of proper legal rules developed by the Commission (and demanded by the ECJ) becomes evident.

The Commission's practice up to date⁶²⁹ only shows that the closer the information exchange is to a cartel case (information ultimately affecting price or quotas), the more likely it seems that the Commission will look at it as an infringement by object, on the contrary the closer the information exchange is to pure information exchange (decreasing uncertainty on itself) the more possible that the Commission will look at it as an infringement by effect.⁶³⁰

In other words, there seems to be a tendency to sanction as infringements by object and use the net of presumptions explained above when information exchanges which are closer to a cartel, whereas if the infringement tends to be one of effect, there might be a tendency to use those presumptions as a threat to reach a commitment decision with the parties.

However, some cases, particularly of young national competition authorities seem not to understand or miss this logic, precisely, again, given the lack of certain and determinate legal rules.

D. The degrees of protection: attempting to endanger

Since we have learnt that information exchanges as self-standing infringements convert a facilitating practice into an autonomous crime, an obvious question arises: how much can we anticipate the barrier of protection in competition law to sanction without infringing the above principles? In other words: is it compatible with criminal law to punish preparatory or attempted stages of behaviors which might be already risk offences?

To answer this question, first, we have to bear in mind the distinction between crimes which just require an activity to be committed and those that required a result.

⁶²⁹ Some authors consider it an "economic approach" (Loozen, 2010) *op. cit.*

⁶³⁰ This is in - our opinion - the general impression that underlays in the Guidelines on Horizontal Cooperation Agreements.

A crime of action is one that just needs the offender to undertake certain physical actions. Drunk driving is the perfect example. No specific result is needed. It is just necessary that a person drives a car while drunk.

A crime of result requires that the action ends up in specific consequence. Homicide is a good example. If I shoot someone and I kill him there is a result. The crime is not shooting someone but killing him. Just shooting will be either an attempt to kill someone or a different crime depending on the circumstances.

Intuitively, one could see a parallel between (abstract) risk offences and crimes of action. In order to create a risk, it is not necessary to cause a harm (a result) or it is sufficient to pose a danger to a precise value deserving (criminal law) protection. However, we should not be guided by first impressions.

There might be cases where the categories are not exactly parallel. For example, reckless driving can be understood as a crime of result. If a car drives at 200km/h on an empty road which is closed to all other traffic for recording an advertisement, he will not be putting at risk the functioning of road system or anyone's life save for that of the driver. There will be no crime. If a car drives at 200km/h on two sided road when passing a cyclist, there is a specific risk posed to the cyclist by a concrete action - passing him and creating a wind force which might be sufficient to make him fall. A similar thing happens with competition law as we will see next.⁶³¹ In a way, one could say that such a concrete placing of risk is on itself a result.⁶³²

Therefore, the theoretical answer is that it is possible. So the ultimate reply to the question asked is that it depends. It depends on the risk offence and the moral and social repulsion attached to it.

In the case of terrorist attacks, most criminal law systems in Europe punish not only the attack but also belonging to a terrorist band or even attempting to create such an organization. In order to do so, it will be extremely useful to be able to identify the

⁶³¹ (Muñoz Conde, 2002) *op. cit.* (Mir Puig, 2011) *op. cit.*

⁶³² Obviously, one caution should be made: these are not clear cut categories, the closer we get to a concrete risk offence, the closer we are getting as well to a specific result, and in a way, to a crime of harm. On these issues see (Kiss, 2015).

chain of events that need to be taken in order to reach the stage of highest danger or actual harm.

In our opinion, this type of certainty and repulsion only exists in the case of hard core cartels. Only, in those cases it seems reasonable to punish the attempted categories. However, this extension of the frontier of protection is subject to certain requirements.

First, the punishment needs to be necessarily lower than the accomplished behavior. There needs to a graduation, that takes into account the distance from the legally protected value.

Secondly, the requirement of culpability will be higher, because the Competition Authority will need to show that the undertaking was aware (or should have been aware) of the likely consequences of its behavior, as we are anticipating the intervention at an earlier step in the chain of events leading to a cartel, the culpability needs to go a step further as well.

As can see, these principles provide already a useful rule of thumb for trying to determine which information exchanges should amount to a sanctionable administrative law infringement and which not.

Only those information exchanges that might undoubtedly lead to the formation of a cartel shall be punished.

VII. CONCLUSIONS

As we have seen throughout our review of the jurisprudence, information exchanges cannot be interpreted without recourse to the ECJ's case law on concerted practices, to such an extent that both terms have ultimately become almost synonyms.

The principle of individual decision making in competitive markets - consecrated in Suiker Unie as a parameter to spot concerted practices – is not only a different test from the one that the economic literature applies – collusion – but it has been expanded into a presumption of anticompetitive behavior even absent any

evidence of concertation. Thus, “tainting” all information exchanges with an ex ante presumption of objective illegality.

The increase in competition enforcement awareness and the resulting decrease of direct evidence of cartels has pushed the European Commission to increase the relevance of indirect evidence - particularly information exchanges - in showing the existence of cartel, decreasing the burden of proof for the Commission to establish the existence of these hard core infringements.

However, we should be aware that competition infringements are infringements of danger and, therefore, a category of infringements prone to interfere with the basic principles of harm and culpability.

The risks that this entails might be small in the case of sophisticated agencies, such as the European Commission, which might assess the facts under an economic lens and use a slightly incorrect language purposely in order to further its goals (see Bananas and T-Mobile). However, it is considerably larger when these concepts are used by less developed Agencies or by regular Courts.

Thus, the EU Courts and, particularly, the national Courts should be extremely careful when assessing the actions that might be deemed as infringements by object – i.e. abstract risk offences. In our opinion, this category if it was to continue to exist (a distinction that we believe should be surpassed) should be left for the classic hard core cartels or slight variations of a classic cartel type offence.

Economic theory is consistent in defending that only naked price fixing and quota allocation are unlawful per se (unless ancillary to an agreement with another objective), the EU Courts should not separate from this approach in their case law.

Although it is true that competition law has been used as a mechanism to further integration within the single market, and that there might arguments in favor of a broader application of object infringements than in the US (i.e. territorial exclusivity, etc.), those arguments do not support a broader interpretation of the concept of object infringements as applied to information exchanges.

An interpretation of Article 101 as a general clause encompassing a prohibition against invitations to collude could be already a step forward. This doctrine could help

bringing the concept of concerted practices within its logical conceptual borders (as it would restore the traditional meaning of concertation) and, at the same time, would allow competition agencies to regulate oligopolistic markets to enhance competition without the risk of Type I errors.

How far should we extend this interpretation of Article 101 TFEU is something that will be settled ultimately by the European Commission and the European Court of Justice.

Moreover, we see no problem in prohibiting what – under criminal terms – could be labelled as the attempt to commit a crime of risk. As we have seen, criminal law theory supports that in order to punish attempted behaviors the relevant issue is not whether the crime is one of risk or harm but, actually, whether the infringements are of mere activity or result. If there are a chain of actions that can lead to commission of the crime, then attempt can be punished.

This does not mean, however, that attempt should be valid in all cases. Since the attempt brings the criminal law punishment to an earlier stage of the infringement there is an agreement among criminal law scholars that it should be left only for the most dangerous crimes; in our case: hard core cartels. Moreover, only willing attempts can be sanctioned.

To sum up, we believe that this invitation to collude doctrine could be incorporated in the EU legal system without modifying Regulation 1/2003. In these cases we would not be interpreting an administrative infringement (there would be no administrative fine) but a general principle of the legal system (Article 101 TFEU).

That is precisely the beauty of general principles, that they allow a wider and flexible application. Obviously, again, one caveat applies: provided that the Competition Authority can sufficiently prove the risk of ending up in cartel and that the legal consequence is just prohibition decision.

Our study on information exchanges has clearly shown how the case law of the ECJ sanctions equally collusion and invitations to collude, without distinguishing among the different actions that are necessary in order to alter competition in the

market. In other words, the ECJ sanctions both competition infringements and attempts to infringe competition law.

That is why the concept of concerted practices has become such a difficult instrument to grasp. There is not a theoretical distinction in the case law of the ECJ between actual collusion, indirect evidence of collusion, attempted collusion, invitations to collude or other preparatory acts, and facilitating practices, with regards to their degree of completion and proximity to the competition as legally protected value.

As we said, the application of the harm principle demands that only horizontal cartels should be prohibited as infringements by object. That is, only in horizontal cartel cases the Commission should not have to show the actual or potential effects of the behavior of the companies. According to economic theory, only in these cases that danger is so evident as to punish a purely abstract risk offence.⁶³³

Information exchanges, as competition law infringements, fall at least within three different categories that the ECJ has not been able to clearly spell out yet.⁶³⁴

1) Information exchanges can be indirect evidence of the existence of a cartel. In those cases they should be fined as a cartel (i.e. infringement by object). In criminal law terms, if collusion is the **crime**, an information exchange might be indirect evidence of the commission of the crime.⁶³⁵

⁶³³ We cannot develop this point further as it would require a whole thesis on itself. Nonetheless, our conclusion is that given the mix economic results as to vertical collusion, there should a progressive shift towards an effects based approach to all cases of vertical collusion, something which is already happening as some commentators have pointed out (Lianos, Collusion in Vertical Relations Under Article 81 EC, 2008) *op. cit.*, (Reindl, 2011) *op. cit.* and the analysis of the GlaxoSmithKline case in (Faull & Nikpay, 2014) *op. cit.* Only those vertical infringements that sustain a horizontal cartel should be treated under the object category, for example, RPM in oligopolistic industries where upstream firms hold significant market power. In other words, RPM could be considered an object infringement if it is clear that it is a practice within cartel. Arguing that RPM could be assessed with the same logic than information exchanges see (Reindl, 2011) *op. cit.*

⁶³⁴ As we have seen this is partially due to the conceptual limitation of having to frame any infringement as an object or effect infringements instead of clearly setting out anticompetitive behaviors in Regulation 1/2003.

⁶³⁵ This is, in fact, acknowledged in the Horizontal Cooperation Guidelines.

2) Information exchanges or information disclosure can be the preliminary step in order to bring a cartel into life. In that case, and provided that the competitors do not act in the market on the basis of the information exchanged, this behavior should be fined as an invitation to collude which, necessarily, requires a lower fine than actually colluding. In criminal law terms, sometimes the information exchange will not prove the existence of a cartel but rather the **attempt** of one (or several parties) to collude. In those cases, we should differentiate between suitable and unsuitable attempts, as well as between willing attempts and negligent attempts.⁶³⁶

3) Information exchanges as self-standing infringements, outside the classic cartel fact pattern, are not collusive by themselves but rather might facilitate collusion. They should only be fined as infringements by effect provided that a sufficient risk (at least potential) to competition can be proven. In criminal law terms, sometimes competitors develop information exchange systems that increase the possibilities to behave coordinately. In criminal law terms, they could be labelled as the preparatory acts in order to commit an offence, or in some cases, those preparatory acts can even be codified, as for example in the case of the illicit association for the purposes of committing a terrorist attack. This is precisely what happened in *UK Tractors*.⁶³⁷

There is a need to develop clear rules to ensure that sanctions are proportionate to the danger. In this regard, it is not paradoxical that the more abstract category is the one more severely fined if it is limited to cartel conduct: the only clearly defined rule.

⁶³⁶ This term is used to show an obvious contradiction, a negligent attempt will never be sanctioned under criminal since the attempted category requires the willingness of the final act that does not take place. (Muñoz Conde, 2002) *op. cit.*, (Mir Puig, 2011) *op. cit.*. In a way, some authors argue that this precisely why risk offences have been created and codified: to cover such gray area. In other words, to compensate the loophole derived require an element of *mens rea* even in the attempted category.

However, given that we are still within the boundaries of administrative law, particularly, if the behavior is prohibited and not sanctioned, we see no major problem in issuing a decision forbidding certain conduct, even if the parties did not attempt to create a cartel but it could have likely been created as a result of the disclosure.

⁶³⁷ Depending on the circumstances they should be fined or just prohibited/dismantled. One thing should be obvious, drunk driving cannot be punished with the same punishment than killing someone while driving drunk, the same way that committing a terrorist attack is a different infringement from associating to commit a terrorist attack. Therefore, facilitating the external circumstances for collusion, should not be sanctioned with the same degree of severity as collusion itself.

The more concrete the conduct, the higher burden of proof for the Commission and the more prone it will be to reach a commitment decision.

The application of the principle of culpability, jointly with those of legality and legal certainty, requires that companies are sanctioned only for those conducts that are clearly unlawful and prohibited ex ante.

To such end, it is necessary to develop a theoretical and normative distinction between the rules and the general principles contained within Article 101 TFEU.

As professors Ghezzi and Maggiolino have pointed out antitrust enforcers need a notion of arrangement flexible enough to catch any behavior that could harm competition, even the most malicious one.⁶³⁸ We cannot fail to acknowledge, therefore, that if only very narrow categories could be sanctioned, Competition Authorities would be bound to legalistic concepts and could not adjust in due time to the developments of economic theory and market behavior. Moreover, it would be ingenuous to ignore that once a specific conduct is described as punishable, undertakings will try to find a mechanism to reach the same result (for example, a collusive outcome) through a different conduct.

Even though it is true that codifying each infringement to the highest degree would be almost impossible and would petrify competition law, there are still many degrees of detail. Moreover, one must realize that is highly doubtful whether Regulation 1/2003, particularly Article 23 meets the most basic requirements set by the Charter of Fundamental Rights, particularly when one looks at the presumptions developed by the EU Courts.⁶³⁹

It is true that soft law has worked considerably well and that it allows Agencies to swift policies more easily. Nevertheless, one thing is to provide the Agencies with discretion when regulating oligopolistic industries and a very different one to allow the same discretion when setting increasingly high monetary fines. We firmly believe

⁶³⁸ (Ghezzi & Maggiolino, 2014) *op. cit.*

⁶³⁹ (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.*

that there must be a direct relationship between the severity of the fine and the discretion of the Administration and our thesis provides it.⁶⁴⁰

In any event, any limits on the scope of the rules, could be compensated by the expansion of the general clause. In this way, new infringements could be prohibited first and, after a consistent practice, sanctioned. In fact, the application of the general clause would allow for positive decisions, such as those originally envisioned in the reform process that lead to Regulation 1/2003.

That is why we believe our proposal is a pragmatic approach to the different problems involved and analyzed so far. In a way, the negative effects associated with both developments counter act each other, while providing more legal certainty within a more coherent system.

VII. CONCLUSIONES

Tal y como hemos visto, los intercambios de información no pueden ser interpretados si no es por referencia a la jurisprudencia del Tribunal de Justicia sobre prácticas concertadas, hasta tal punto que ambos términos han terminado en convertirse prácticamente en sinónimos.

El principio de autonomía en la toma de decisiones – consagrado en *Suiker Unie* como parámetro para identificar prácticas concertadas – no solo es un test distinto del que aplica la literatura económica – colusión – sino que se ha convertido en una presunción de comportamiento anticompetitivo incluso en ausencia de una evidencia clara de concertación. Ello impregna todos los intercambios de información con una presunción ex ante de antijuridicidad objetiva.

⁶⁴⁰ Our thesis, at the very least, allows reducing the discretion on the legal consequences by proving some certainty as to the final outcome depending on whether we are within a general application of Article 101 TFEU or within an identified competition law offence. Distinguishing the different levels at which the Administrative discretion can take place see (Bacigalupo, 1997). As Professor Hovenkamp has brilliantly explained a significant problem of pursuing collusive behavior in ambiguous situations is false positives. “The least costly way to pursue facilitating practices or collusion-like behavior in the absence of explicit evidence of agreement is for the Agencies to identify anticompetitive practices and then condemn them with cease and desist orders”. (Hovenkamp, The Federal Trade Commission and The Sherman Act, 2010), *op. cit.*

El incremento de la concienciación sobre la importancia del Derecho de la competencia y el consecuente decremento de la evidencia directa de la existencia de cárteles ha empujado a la Comisión Europea a dar mayor importancia a las pruebas indirectas – particularmente los intercambios de información – a los efectos de demostrar la existencia de un cartel, rebajando el estándar de prueba que se exige a la Comisión para probar la existencia de tales infracciones palmarias del Derecho de la competencia.

Pese a ello, deberíamos recordar que la mayoría de infracciones del Derecho de la competencia son delitos de peligro y, por tanto, una tipología de infracciones muy propensa a interferir con los principios básicos de lesividad y culpabilidad.

El riesgo que ello conlleva puede resultar pequeño en el caso de Autoridades sofisticadas, como la Comisión Europea, las cuales analizan los hechos desde una perspectiva económica y que pueden preferir utilizar un lenguaje parcialmente incorrecto para poder lograr sus objetivos (léase *Bananas* y *T-Mobile*). Sin embargo, dicho riesgo es considerablemente más alto cuando es utilizado por Autoridades menos desarrolladas o por Tribunales no especialistas.

Por ello, los Tribunales de la Unión y, en particular, los Tribunales nacionales deberían ser especialmente cautos a la hora de analizar acciones que podrían ser catalogadas como infracciones por objeto - i.e. delitos de peligro abstracto. En nuestra opinión, si esta categoría continuase existiendo (una distinción, la de objeto y efecto, que debería quedar obsoleta) debería restringirse a los cárteles secretos o a las variaciones conocidas de dicha infracción.

La teoría económica es pacífica a la hora de concluir que únicamente los cárteles sobre precios o cantidades son ilícitos per se (salvo que sean accesorios a otro objetivo legítimo), los Tribunales no deberían separarse de dicho enfoque en su jurisprudencia.

Si bien es cierto que el Derecho de la competencia ha sido utilizado como un mecanismo para avanzar en la integración del mercado interior, y pueden existir argumentos que aboguen por una aplicación más amplia que en Estados Unidos de esta categoría de infracciones por objeto (i.e. evitar la fragmentación), dichos argumentos carecen de relevancia a la hora de defender una aplicación más amplia de las infracciones por objeto respecto de los intercambios de información.

Una interpretación del artículo 101 TFUE como una cláusula general en el que se entenderían englobadas las invitaciones a coludir sería un avance teórico considerable. Esta doctrina ayudaría a reducir la brecha existente entre el concepto actual de práctica concertada y el significado racional de coordinación (unión de voluntades), mientras que, al mismo tiempo, permitiría a las Autoridades de competencia la regulación de los mercados oligopolísticos sin el riesgo de imponer sanciones injustas (errores de Tipo I en la terminología económica).

Hasta donde deberá extenderse la aplicación general del Artículo 101 TFEU mediante órdenes de cesación, es algo que debe ser resuelto en última instancia por la Comisión Europea y el Tribunal de Justicia.

Asimismo, no vemos que exista ningún problema en prohibir lo que en términos de derecho penal podría considerarse como la tentativa de cometer un delito de peligro. Como hemos visto, la dogmática penal apoya la tesis de que a la hora de sancionar comportamientos intentados lo relevante no es tanto si la infracción es una de peligro o de lesión, sino si las infracciones son de mera actividad o puede deducirse un “resultado de peligro”. En otras palabras, en la medida en que exista una cadena de eventos (un *iter criminis*) que lleve a la comisión de la infracción, la tentativa podrá ser sancionada.

Ahora bien, ello no conlleva que la tentativa pueda ser aceptada en todos los supuestos. Dado que la tentativa adelanta la barrera de protección a un momento previo de la comisión de la infracción, existe un consenso en la dogmática penal exigiendo que la punición de dichas conductas quede reservada a los delitos más peligrosos, lo que en nuestro caso sería el supuesto de los cárteles secretos. Por otra parte, aunque obvie decirlo, únicamente las tentativas dolosas podrán ser sancionadas.

En resumen, creemos que una teoría sobre la invitación a coludir podría ser introducida en el Derecho de la Unión sin modificar el Reglamento 1/2003. En estos casos, la aplicación del 101 TFUE no sería la de la infracción administrativa típica (no se impondría una sanción monetaria) del Reglamento 1/2003, sino la de la cláusula general (artículo 101 TFEU).

Aquí yace la belleza de las cláusulas generales que desarrollan principios generales, su capacidad de aplicación amplia y flexible. Evidentemente un requisito

inexorable resulta de aplicación: la necesidad de que la Autoridad de Competencia demuestre el riesgo cierto de que la conducta podría resultar en un cartel y que la consecuencia jurídica se limite a la cesación de la conducta.

Nuestro estudio sobre intercambios de información ha demostrado que, al menos aparentemente, el Tribunal de Justicia sanciona por igual la colusión y las invitaciones a coludir, sin distinguir el cúmulo de actuaciones que resultan necesarias para alterar la competencia en el mercado. En otras palabras, en principio, la jurisprudencia comunitaria permite sancionar de igual manera las infracciones del Derecho de la competencia y las tentativas de realizar tal infracción.

Este es uno de los grandes motivos por el que el concepto de prácticas concertadas se ha convertido en un instrumento jurídico tan difícil de aprehender. No existe actualmente en la jurisprudencia del Tribunal, una distinción teórica entre la colusión expresa, la prueba indirecta de la existencia de colusión, las invitaciones a coludir, y el resto de actuaciones preparatorias para lograr llegar a la misma, respecto de su nivel de desarrollo y proximidad al bien jurídico protegido, “la competencia”.

Tal y como se ha razonado, la aplicación del principio de lesividad exige que solo los cárteles secretos horizontales sean prohibidos y sancionados como infracciones por objeto (esto es como delitos de peligro abstracto). En efecto, únicamente en este caso la Comisión no deberá probar los efectos actuales o potenciales del comportamiento de los competidores. De acuerdo, con la teoría económica únicamente en estos casos el peligro es tan evidente como para sancionar una infracción puramente de peligro abstracto.⁶⁴¹

⁶⁴¹ Este punto no puede ser desarrollado más en extenso aquí pues requeriría una investigación propia en si misma. No obstante, de manera sumaria, nuestra intuición es que dada la incertidumbre en la literatura económica respecto de los resultados de la colusión vertical, debería producirse una tendencia hacia su estudio como delitos de peligro concreto, algo que en cierta medida ya está sucediendo. (Lianos, *Collusion in Vertical Relations Under Article 81 EC*, 2008) *op. cit.*, (Reindl, 2011) *op. cit.* y el análisis de GlaxoSmithKline en (Faull & Nikpay, 2014) *op. cit.* Sólo aquellas infracciones verticales que puedan soportar una cartel horizontal deberían ser sancionadas como infracciones por objeto, por ejemplo, la fijación de precios de reventa en mercados altamente concentrados donde las empresas aguas arriba disponen de un alto poder de mercado. Sugiriendo que los acuerdos de fijación de precios de reventa podría ser analizado bajo una lógica similar a los intercambios de información, véase (Reindl, 2011) *op. cit.*

Los intercambios de información, como una infracción del Derecho de la competencia, pueden subsumirse en, al menos, tres categorías distintas que no han sido claramente delineadas por el Tribunal de Justicia todavía.⁶⁴²

1) Los intercambios de información pueden ser la prueba indirecta de la existencia de un cartel. En estos casos deben ser sancionados como un cartel (infracción por objeto). En términos penales, si la colusión es el crimen el intercambio puede ser la prueba indirecta clave de la comisión del mismo.⁶⁴³

2) Los intercambios de información o la divulgación de información puede ser un paso preliminar en la formación de un cartel. En dicho caso y siempre y cuando los competidores no utilicen dicha información en el mercado, este comportamiento deberá ser sancionado como una invitación a coludir que, necesariamente, requiere una sanción menor que la colusión propiamente dicha. En términos penales, en algunas ocasiones el intercambio no demostrará la existencia de un cartel sino la intención de uno o más partes de llevarlo a cabo. En estos casos, las Autoridades deberán distinguir las tentativas idóneas de las inidóneas, y las tentativas dolosas de las negligentes.⁶⁴⁴

3) Los intercambios de información como comportamientos autónomos, fuera del funcionamiento de un cartel, no son colusorios en si mismo sino que pueden facilitarlos. Por ello, únicamente podrán ser sancionados como infracciones por efecto siempre y cuando el riesgo (aunque potencial) pueda ser suficientemente probado. En términos de derecho penal, en ocasiones los competidores desarrollan sistemas de

⁶⁴² Ello se debe en parte a la necesidad de introducir las conductas infractoras en el lenguaje del 101 TFUE dada la falta de clarificación normativa del Reglamento 1/2003.

⁶⁴³ Algo que de hecho reconocen las Directrices de Cooperación Horizontal.

⁶⁴⁴ Este término se utiliza para demostrar una contradicción evidente, una tentativa negligente nunca podrá sancionarse pues la tentativa, por su propio nombre, requiere la voluntad de que el acto ultimo tenga lugar (Muñoz Conde, 2002) *op. cit.*, (Mir Puig, 2011) *op. cit.*. En cierta manera, algunos autores sostiene que precisamente por ello las infracciones de peligro se han codificado: para cubrir esta zona gris.

No obstante, dado que nos encontramos todavía en los reinos del Derecho administrativo, si el comportamiento se prohíbe pero no se sanciona, en principio, no plantearía mayores problemas prohibir este tipo de conductas en que la voluntad de las partes no era lograr un cartel pero su divulgación de información podría generarlo posteriormente.

intercambio de información que incrementan las posibilidades de comportamiento coordinado. Bajo la dogmática penal, esto podría concebir como los actos preparatorios de un delito, lo que en algunos casos incluso se codifica por los códigos penales como un delito autónomo, por ejemplo piénsese en la asociación ilícita para cometer actos terroristas. Esto es en nuestra opinión precisamente lo que ocurrió en *UK Tractors*.⁶⁴⁵

Existe una necesidad acuciante de desarrollar reglas jurídicas que aseguren que la sanción es proporcionada con respecto al peligro causado. A este respecto, no resulta paradójico que la categoría más abstracta sea la sancionada más severamente si nos limitamos a las conductas de cartel: que es la única regla-tipo de la que disponemos. Cuanto más concreta sea la necesidad de probar el daño (delitos de peligro concreto o de resultado), mayor carga probatoria se exigirá a la Comisión y más probable sea que la investigación termine en una terminación convencional con compromisos.

La aplicación conjunta de los principios de lesividad, culpabilidad y seguridad jurídica exige que las empresas sean sancionadas monetariamente únicamente por aquellas conductas claramente ilícitas y prohibidas “ex ante”.

A tal efecto, es fundamental trazar la distinción teórica entre las reglas tipo y los principios generales contenidos en el artículo 101 TFEU explicada anteriormente.

Como han subrayado los profesores Ghezzi y Maggolino las Autoridades de competencia necesitan conceptos flexibles que les permiten capturar todo tipos de comportamientos dañinos.⁶⁴⁶ No podemos por tanto obviar que la fijación de reglas cuidadosamente tasadas podría atar las manos de las Autoridades a tipologías que les impidiesen adaptarse rápidamente a la evolución de la teoría económica y de los comportamientos de los mercados. Asimismo, resultaría ingenuo ignorar que una vez

⁶⁴⁵ Dependiendo de las circunstancias, éstas deberían ser prohibidas o sancionadas. Una cosa resulta evidente, conducir borracho no puede sancionarse con la misma severidad que un homicidio conduciendo bajo los efectos del alcohol, del mismo modo que la comisión de un acto terrorista no debería sancionarse del mismo modo que la asociación para cometerlo. En otras palabras, facilitar las circunstancias externas que pueden llevar a un comportamiento coordinado, no puede sancionarse del mismo modo que coludir directamente.

⁶⁴⁶ (Ghezzi & Maggolino, 2014) *op. cit.*

que una conducta se tipifica, las empresas trataran de lograr los mismos objetivos a través de conductas que no queden expresamente recogidas bajo el tenor de la norma.

No obstante, si bien es cierto que una codificación excesiva podría llevar a la petrificación del Derecho de la competencia, no debe obviarse que existen muchos niveles de detalle. Más aún, cuando es altamente dudoso que el Reglamento, particularmente el artículo 23.2., cumpla con los requisitos mínimos de la Carta Europea de Derechos Fundamentales, particularmente cuando uno observa las presunciones desarrolladas por los Tribunales de la Unión.⁶⁴⁷

Es cierto que el llamado derecho blando “*soft law*” ha funcionado considerablemente bien y faculta a las Autoridades a corregir el rumbo de sus políticas de manera relativamente sencilla. No obstante, una cosa es proporcionar a las Autoridades con la discreción para regular mercados oligopolísticos y otra muy distinta permitir el mismo margen de discreción en la imposición de sanciones cada día más elevadas. Creemos firmemente que debe existir una relación inversa entre la severidad de la sanción y la discreción concedida a la Administración y nuestra tesis proporciona un modo de lograrlo.⁶⁴⁸

En cualquier caso, cualesquiera límites que pudiesen derivarse del desarrollo de reglas tasadas se verían compensados por la interpretación amplia de la cláusula general.

De este modo, las “nuevas” conductas infractoras podrían prohibirse en primer lugar y tras una práctica decisoria reiterada ser sancionadas. De hecho, la aplicación de la cláusula general debería incluso permitir la emisión de decisiones favorables como aquellas inicialmente previstas en el proceso de reforma que desembocó en el Reglamento 1/2003.

⁶⁴⁷ (Bronckers & Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, 2011) *op. cit.*

⁶⁴⁸ Nuestra tesis permite, al menos, reducir la discreción respecto de las consecuencias jurídicas al proporcionar cierta certeza sobre las consecuencias dependiendo de si se trata de una infracción de la cláusula general o de un tipo/infracción concreta. Distinguiendo los distintos niveles en que puede tener lugar la discreción de la Administración, véase (Bacigalupo, 1997). Tal y como ha explicado el profesor Hovenkamp brillantemente, un problema relevante de perseguir el comportamiento colusorio son los falsos positivos. La manera menos costosa de evitarlos es mediante las acciones de cesación. (Hovenkamp, The Federal Trade Commission and The Sherman Act, 2010), *op. cit.*

Es por ello por lo que creemos que nuestra propuesta proporciona un enfoque pragmático para los problemas analizados. En cierto modo, podría decirse que los efectos negativos contrarrestan a los positivos, mientras que se incrementa la seguridad jurídica de los operadores bajo un sistema mucho más congruente.

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